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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

CHEVRONTEXACO CORPORATION AND
TEXACO PETROLEUM COMPANY,

Petitioners,

v.

REPUBLIC OF ECUADOR AND PETROECUADOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal common law, a contractual arbitration clause generally may be enforced against a nonsignatory pursuant to ordinary principles of contract and agency, including either assumption or estoppel. This case raises a split of authority on an important legal question within this framework:

Where a government entity steps into the shoes of a private party in a commercial joint venture and takes substantial and direct benefits under the venture's joint operating agreement, is it bound by the arbitration provision in the joint operating agreement?

CORPORATE DISCLOSURE STATEMENT

Petitioner ChevronTexaco Corporation, whose name was changed to Chevron Corporation in 2005, has no parent corporation and no publicly held company owns ten percent or more of its stock.

Petitioner Texaco Petroleum Company's ultimate parent is Chevron Corporation; no other publicly held company owns ten percent or more of Texaco Petroleum Company's stock.

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PETITION FOR WRIT OF CERTIORARI

Chevron Corporation and Texaco Petroleum Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York was issued on June 19, 2007, and is reported at 499 F. Supp. 2d 452 (Pet. App. 3a-37a).

The summary order of the United States Court of Appeals for the Second Circuit was issued on October 7, 2008, and is reported at 296 F. App'x 124 (Pet. App. 1a-2a).

JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit was issued on October 7, 2008. Pet. App. 1a-2a. Petitioners' petition for panel rehearing and rehearing *en banc* in the Second Circuit was denied on December 8, 2008. Pet. App. 132a-133a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The question presented is governed by federal common law. Included in the Appendix are relevant provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, *reprinted at* 9 U.S.C. § 201 note; and the Inter-American Convention on International Commercial Arbitration of January 30,

1975, O.A.S.T.S. No. 42, *reprinted at* 9 U.S.C. § 301 note. Pet. App. 134a-157a.

STATEMENT

In 1974, by government edict, respondent Petroecuador, a state-owned oil company, became an owner—and in 1977 became majority owner—of a Consortium that produced crude oil in Ecuador until 1992. When Petroecuador entered the Consortium, its partner, petitioner Texaco Petroleum Company ("TexPet"), was serving as the Consortium's operator under the Napo Joint Operating Agreement ("JOA"). Although Petroecuador did not sign the JOA, it took substantial and direct benefits from the contract. Over the course of nearly two decades, Petroecuador repeatedly invoked provisions of the JOA that it deemed advantageous and received billions of dollars in revenue as a direct result of TexPet's labors as operator under the agreement.

It is settled federal common law that a nonsignatory is bound by a contract from which it has taken benefits. But Petroecuador now denies that it has any corresponding obligations under the JOA—including the obligation to resolve Consortium-related disputes in a neutral arbitral forum that acts in accordance with the rule of law. Specifically, Petroecuador resists arbitration of its obligations with respect to a pending Ecuadorian lawsuit in which a court-appointed "expert" has recommended damages against TexPet's parent corporation of over $27 *billion* based upon Consortium operations conducted under the JOA.

In allowing Petroecuador to achieve this inequitable result, the judgment below creates a conflict with another circuit court and departs from

settled principles of assumption and estoppel. That judgment, furthermore, was issued without opinion—the Second Circuit merely adopted the reasoning of the district court as its own in a summary order. Given the weighty issues involved and the importance of uniformity in the federal common law, this was a wholly inappropriate departure from traditional appellate decisionmaking. Without providing any independent analysis, the Second Circuit has adopted a rule of law that undermines the certainty of international arbitration and exposes U.S. companies to the caprices of foreign governments. In an era of extraordinary government intervention and investment in private business, both in the United States and abroad, this case raises important and timely legal issues that demand clarification by this Court.

A. The Consortium and Its Joint Operating Agreement

From 1964 until 1992, TexPet participated in a Consortium for the exploration and production of petroleum in the Oriente region of Ecuador. Originally, the Consortium was comprised of TexPet and Ecuadorian Gulf Oil Company ("Gulf"), another U.S. corporation. (A-2235; A-2248.)[1] TexPet and Gulf operated in Ecuador by the authority granted them under various concession agreements with respondent the Republic of Ecuador. (A-1982; A-1998-99; A-2035-36; A-2235; A-2248; A-2398.) As is routine in such major petroleum joint ventures, to address issues concerning their internal commercial, operational, and administrative relationship, TexPet

[1] A-____ refers to the Joint Appendix filed in the Court of Appeals.

and Gulf separately entered into the JOA in 1965. (A-2000; A-2295-2331.) The cardinal *quid pro quo* of the JOA was that one party would serve as the operator free of charge in return for the other party's agreement to bear its share of operating costs and to indemnify the operator for its share of any third-party liability. (A-2295-2331.) The JOA secured these rights and obligations by expressly requiring the parties to arbitrate any disputes with the American Arbitration Association under the laws of New York. (A-2326; A-2329.)

B. Petroecuador Enters the Consortium and Adheres to the Joint Operating Agreement

The Ecuador Government mandated that Petroecuador join the Consortium, and it did so in 1974 by taking a 12.5 percent interest from TexPet and Gulf, respectively. (A-2397; A-2035.) In 1977, Petroecuador acquired Gulf's remaining interest and, with a 62.5 percent share, obtained the majority voice in the Consortium. (A-2243; A-2455-66.)[2]

Upon its entry into the Consortium, Petroecuador received from TexPet a copy of the JOA, which by its terms was binding on successors and assigns of the original parties. (A-2323-31.) Although Petroecuador never signed the JOA, TexPet continued serving as the Consortium's operator and conducting operations as it always had under the JOA. (*E.g.*, A-2037; A-

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[2] In addition to Petroecuador's share of production, the Republic of Ecuador received a "host government take" in oil and cash. (A-2035; A-2241; A-769; A-2358.) All told, respondents received approximately 95 percent of the Consortium's revenues, totaling nearly $25 billion during the life of the Consortium—roughly half of Ecuador's gross national product over the same period. (A-2246.)

2039; A-2223-24; A-2242; A2887-89; A-3086-3087; A-3105-06; A-3196; A-3386; A-3389.) Petroecuador consistently recognized that, by its entry into the Consortium, it had become a party to the JOA. For example, a former general manager for Petroecuador averred that Petroecuador "became a party to the . . . JOA" when it joined the Consortium, and an Ecuadorian official in 1979 similarly acknowledged that TexPet had "the right to continue being the Operator" because the JOA so provided and Petroecuador "did not state a different opinion." (A-2223; A-3377.) In addition, at the end of the Consortium, respondents in a settlement agreement listed the JOA among the "Consortium Agreements" under which "oil exploration and production operations [were] carried out." (A-2618; A-2640.) At no time during the Consortium did Petroecuador deny the existence or continued operation of the JOA.

Consistent with this understanding, Petroecuador repeatedly invoked the provisions of the JOA to its benefit. For example, Petroecuador's internal auditors—noting that Consortium operations were "governed" by the JOA—identified perceived lapses by TexPet with respect to various JOA provisions (*e.g.*, the schedule for making cash calls) and demanded compliance. (A-2216; A-3540; A-3547-92; A-3725-28.) In addition, in order to obtain a loan, Petroecuador told the Ecuador Central Bank that the JOA "regulates the operations of the Petroecuador-Texaco Consortium." (A-4089.) Petroecuador also invoked article 6 of the JOA to support its claim to become the Consortium operator in 1982. (A-3512; A-3517-18.) When TexPet responded with the possibility that the JOA was invalid, Petroecuador "refuse[d] to accept this possibility"—prompting

TexPet to acknowledge Petroecuador's right to invoke the JOA. (A-1392; A-3514.)[3]

C. The Settlement and Release

The concession, and TexPet's joint venture with Petroecuador, ended in 1992, after which TexPet entered into a settlement with respondents to address environmental impacts arising from Consortium operations. (A-2615.) Under a series of agreements, TexPet performed its share of remedial work at a cost of $40 million, and respondents—after reviewing and certifying that work—gave TexPet a broad release from any further liability for environmental conditions in the former concession area. (A-2591-93; A-2606-09; A-2615-41; A-2670-75; A-3048-55.) For the past 17 years, Petroecuador has been the sole owner and operator of the oil fields in the former concession area. (A-2246.)

D. Petitioners Seek Arbitration Under the Joint Operating Agreement

Pursuant to the JOA, petitioners in 2004 initiated arbitration against Petroecuador to recover the costs of a Consortium-related lawsuit pending against petitioner Chevron Corporation ("Chevron") in Lago Agrio, Ecuador. (A-233-51.) The Lago Agrio lawsuit, brought by Ecuadorian citizens represented by U.S. plaintiffs' lawyers, alleges that Consortium operations caused environmental harm. (A-2595; A-2743-69.) Despite their majority interest in the

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[3] Because it turned out that Petroecuador did not have the capacity to become operator at the time, the parties agreed to defer the transition, which ultimately took place in 1990. (A-2484-86.) They continued to adhere to the JOA until a new joint operating agreement was signed in 1991. (A-2043; A-2244-45; A-2557-58; A-4172-94.)

Consortium and their release of TexPet from any further remedial liability, respondents were not named in the Lago Agrio complaint. Instead, as reflected in emails between Ecuador's Assistant Attorney General and representatives of plaintiffs, the Ecuador Government has been working with plaintiffs to "nullify or undermine the value of the [TexPet settlement]." (A-4262.) In the shadow of the President of Ecuador's personal denunciation of Chevron (A-4819), a court-appointed "expert" in the Lago Agrio case has recommended that one of the largest verdicts in history, over $27 *billion*, be awarded against Chevron (*Chevron: Errors Continue*, Latin Bus. Chron. (Feb. 12, 2009), *available at* http://www.latinbusinesschronicle.com/app/article.aspx?id=3142 (last visited Mar. 5, 2009)).

E. District Court Rulings

Respondents brought an action in state court to enjoin the arbitration, and petitioners removed the case to the United States District Court for the Southern District of New York. In their Amended Complaint, respondents requested, as relevant here, a permanent injunction on the theory that Petroecuador is not bound by the JOA's arbitration provision. (A-86-115.)

Respondents' first motion for summary judgment was denied by the district court on June 27, 2005. *See Rep. of Ecuador v. ChevronTexaco Corp.*, 376 F. Supp. 2d 334 (S.D.N.Y. 2005) (Pet. App. 38a-131a). After determining that it had jurisdiction under 28 U.S.C. § 1332(a)(4) and 9 U.S.C. § 205, the district court agreed with respondents that the question of arbitrability should be determined by federal common law. Pet. App. 57a-59a, 65a, 71a n.15, 79a.

Focusing upon principles of estoppel, the district court noted that a nonsignatory may be bound to arbitrate where it "receives a direct benefit from a contract containing an arbitration clause." Pet. App. 79a (internal quotation marks omitted). It then reviewed the evidence of Petroecuador's acknowledgment and exploitation of the JOA, some of which is discussed above, *see* pp. 4-6, *supra*, and found "sufficient evidence in the record . . . to raise a genuine issue of material fact regarding whether Petroecuador became bound by the arbitration clause in the 1965 JOA." Pet. App. 81a.

Later, after the parties had engaged in extensive discovery and had fully briefed and argued their cross-motions for summary judgment on the issue of arbitrability, the district court *sua sponte* ordered a foreign-law hearing under Federal Rule of Civil Procedure 44.1. (A-4817.) On June 19, 2007, after that hearing, the district court granted summary judgment to respondents, permanently enjoining arbitration under the JOA. *See Rep. of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452 (S.D.N.Y. 2007) (Pet. App. 3a-37a).[4]

In so doing, the district court, in apparent reversal of its prior holding that there was sufficient evidence

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[4] Respondents' other claims and petitioners' counterclaims remain pending in the district court. *See generally Rep. of Ecuador v. ChevronTexaco Corp.*, 426 F. Supp. 2d 159 (S.D.N.Y. 2006). Respondents have taken the position that their other claims were made "conditional" retroactively and will "self-extinguish" if this Court does not overturn the rulings below; the district court has indicated that it will not consider the remaining claims and counterclaims until the issue of arbitrability is finally resolved. *See generally* Pet. App. 36a-37a.

to raise a material dispute of fact, ruled that Petroecuador's repeated invocations of the JOA were legally "irrelevant." Pet. App. 35a. The relevant inquiry, the district court now held, was not *Petroecuador's* conduct throughout the Consortium, but rather *TexPet's* reliance on "Ecuadorian law" at the outset of the Consortium. Pet. App. 14a; *accord* Pet. App. 17a (asking whether "reliance [by TexPet] on the laws of Ecuador . . . was reasonable"). While repeating that federal common law provided the rule of decision, the district court stated that it was "impossible to properly analyze" the case under federal common law "without reference to the underlying Ecuadorian law." Pet. App. 14a. Given the existence of potential Ecuadorian law defenses that Petroecuador might have raised to the JOA upon its entry into the Consortium, the district court found that Ecuadorian law was "too unsettled in 1974" for there to have been a "reasonable expectation by Chevron that the JOA had continuing validity." Pet. App. 18a-19a. It further held that Petroecuador could not be bound in the absence of evidence that TexPet "actually believed" the JOA was binding at the beginning of Petroecuador's participation in the joint venture. Pet App. 18a-19a. The district court viewed its conclusions regarding the uncertainty of Ecuadorian law as dispositive, and it declined to consider Petroecuador's 17-year course of conduct under the JOA. Pet. App. 36a ("The Court need not engage in a determination of whether PetroEcuador can be estopped under the American federal law of estoppel from denying that it is bound to the JOA by its course of conduct because any reliance on a course of conduct in Ecuador would be unreasonable."). As in its prior opinion, the district court's analysis

focused solely upon estoppel and did not separately address Chevron's arguments under assumption. Pet. App. 14a-17a.

F. Judgment of the Court of Appeals

Chevron appealed the permanent injunction against arbitration to the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 1292(a)(1) and 9 U.S.C. § 16(a)(2). In a summary order issued on October 7, 2008, the panel affirmed "for substantially the reasons stated by the District Court." Pet. App. 2a. Petitioners' petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 8, 2008. Pet. App. 132-133a.

REASONS FOR GRANTING THE WRIT

The Second Circuit's failure to offer any analysis of its own in such important a case is unacceptable. The district court's decision conflicts with a Federal Circuit Court of Appeals case that is directly on point and with basic principles of assumption and estoppel. It dramatically circumscribes the availability of international arbitration, with the result being that petitioners and other U.S. companies must now resort to asking corrupted foreign judicial systems to hold state-owned companies responsible for their commercial obligations. The Second Circuit's affirmance of this decision is problematic enough; its determination that the circumstances did not even warrant a written opinion is incomprehensible. The circuit law established in this case, moreover, is acutely important given the nature of the issue, the frequency with which it and similar issues arise in the Second Circuit, and the timeliness of the issue in light of the increasing government intervention in

the private sector in response to the current economic crisis. The need for a reasoned decision on this issue, and for resolution of the circuit split, make review by this Court essential.

I. THE DECISION BELOW BRINGS SECOND CIRCUIT LAW INTO CONFLICT WITH THAT OF THE FEDERAL CIRCUIT AND WITH SETTLED PRINCIPLES OF ASSUMPTION AND ESTOPPEL

Certiorari should be granted to resolve a conflict between the law of the Second Circuit and the law established by the Federal Circuit in *Hardie v. United States*, 367 F.3d 1288 (Fed. Cir. 2004). In that case, the Federal Circuit held that the U.S. Government "assume[s] the obligations of [an] original party" to a joint venture agreement when it "elect[s] to step into the shoes of" an original party by "receiv[ing] that party's interest, retain[ing] it for . . . several years . . . , and conduct[ing] its business in a decidedly nonpublic and nongeneral manner." *Id.* at 1289-91 (internal quotation marks omitted). Here, by contrast, the Second Circuit—in substantially adopting the reasoning of the district court as its own—held that such a "course of conduct" was legally "irrelevant" and, thus, could not bind Petroecuador to the JOA. Pet. App. 35a.

This conflict on the ultimate legal question stems from conflicting reasoning on several anterior issues:

First, the law as it now stands in the Second Circuit is that when one seeks to enforce a contract against a nonsignatory based upon its course of conduct, the doctrine of assumption is subsumed by the doctrine of estoppel. *See* Pet. App. 14a-17a. The Federal Circuit, by contrast, focused exclusively on

assumption and did not require proof of "reasonable reliance" or other elements of estoppel.

Second, the law as it now stands in the Second Circuit is that cases applying special rules for estoppel against government entities are relevant in the commercial context. Pet. App. 14a-17a. The Federal Circuit, by contrast, concluded that the Government "shed[s] [its] public persona" by participating in a commercial joint venture and, thus, can be "bound by the terms of the joint venture agreement under the law applicable to . . . private individuals." *Hardie v. United States*, 19 F. App'x 899, 906 (Fed. Cir. 2001); *id.* at 905 (relying upon *United States v. Winstar Corp.*, 518 U.S. 839, 895 (1996)); *Hardie*, 367 F.3d at 1291 (internal quotation marks omitted).

Third, the law as it now stands in the Second Circuit is that enforcement of a commercial contract against a government is foreclosed by the failure to follow potentially applicable government contracting requirements (*e.g.*, registration of the contract in the National Hydrocarbons Registry). Pet. App. 19a-29a.[5] The Federal Circuit, by contrast, held that even though such a requirement had not been met

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[5] Almost inevitably, noncompliance with contracting requirements makes a nonsignatory's obligations uncertain *before* it takes the contract's benefits—a truism both with respect to government *and* private entities. The rationale adopted below was that this initial and temporary uncertainty forever precludes reasonable reliance on the nonsignatory's subsequent course of conduct. *See* Pet. App. 35a. Neither court below, furthermore, decided whether or not the contracting requirements asserted by respondents even applied to the JOA. Pet. App. 18a-19a (finding only that Ecuadorian law was "unsettled").

(*i.e.*, the Government "did not waive its sovereign immunity as to binding arbitration in accordance with the Administrative Dispute Resolution Act"), the Government was "subject to the arbitration clause of the joint venture agreement just as any private party would be." *Hardie*, 367 F.3d at 1290-91.[6] In the two cases, therefore, conflicting reasoning yielded opposite answers to the question presented here.

The factual similarities between the two cases underscore the conflicts in reasoning and result. Like TexPet and Gulf here, two private parties in *Hardie* "entered into a joint venture agreement . . . to organize, own, and operate" a commercial enterprise. 367 F.3d at 1289. Years later, "the government acquired [a] general partnership interest in the enterprise," under circumstances where the remaining private party, like TexPet here, "had no choice but to accept its new 'partner.'" *Id.* at 1289, 1291 (internal quotation marks omitted).[7] After the

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[6] The Administrative Dispute Resolution Act requires, among other things, that the Government's consent to arbitration be in a writing that specifies the maximum amount of any award. 5 U.S.C. § 575(a)(2).

[7] The Government acquired its interest through forfeiture proceedings, based on the fact that one of the original parties, LCP Associates, used the venture to launder drug money. *Hardie*, 19 F. App'x at 900. The other original party, Park Place Associates, Ltd. ("PPA"), was permitted to retain its joint venture interest because it "was innocent of any criminal activity." *Hardie*, 367 F.3d at 1289. The Federal Circuit observed that there "[s]urely . . . would be privity of contract between PPA and the United States in this case if LCP had simply *sold* its interest in the . . . joint venture outright to the United States as soon as the joint venture was executed," and further concluded that it made no "difference that the United States happened to obtain its 'interest' . . . through forfeiture, as

venture continued for several more years, the remaining private party, Park Place Associates, Ltd. ("PPA"), sued the Government for breach of the joint venture agreement, and it ultimately invoked the contract's arbitration clause. *Id.* at 1289-90.

As noted, the U.S. Government's defense in *Hardie*—that it neither had affirmatively consented to the joint venture agreement nor had complied with U.S. legal requirements for government contracts—was analogous to Petroecuador's position in this case that it neither expressly agreed to the JOA nor complied with government contracting requirements under Ecuador law. PPA, like TexPet, argued that the contract nevertheless was binding because the Government, "through its lengthy course of conduct beginning with the forfeiture . . . , 'stepped into the shoes' of" an original party to the joint venture agreement. *Hardie*, 19 F. App'x at 903. Specifically, the Government participated in the venture and received more than $30 million in proceeds, just as Petroecuador participated in the Consortium and received oil production worth billions of dollars. *Id.* at 900. The Government's acknowledgments of the joint venture agreement also mirrored Petroecuador's acknowledgments of the JOA:

- In *Hardie*, the Government acknowledged it was the joint venture's "Administrative Officer"—"a position that existed solely by virtue of an explicit provision in the Joint venture agreement." 19 F. App'x at 904. Here,

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(continued...)

opposed to any other means." *Hardie*, 19 F. App'x at 905 (emphasis added).

Petroecuador acknowledged TexPet was the "Operator"—a position that existed solely by virtue of an explicit provision in the JOA. (A-3540; A-3377; A-2305.)

- In *Hardie*, a settlement agreement signed by the Government expressly acknowledged that the joint venture agreement remained in existence. 19 F. App'x at 904. Here, the JOA expressly mandated its application to any successor-in-interest (A-2331), and the 1995 settlement contract listed the JOA as one of the agreements that governed the Consortium's operations (A-2618; A-2624; A-2640).
- In *Hardie*, the Government expressly acknowledged a "right of first refusal" that existed only under the joint venture agreement. 19 F. App'x at 904. Here, Petroecuador expressly acknowledged that it became operator of the Consortium by exercising its right under the JOA. (A-2617; A-3512; A-3517.)
- In *Hardie*, a Government audit report confirmed its status as a successor-in-interest. 19 F. App'x at 904-05. Here, the 1995 settlement contract acknowledged that Petroecuador was a successor-in-interest, and Petroecuador's auditor confirmed that the JOA governed the Consortium's operations. (A-2616-17; A-3540; A-3900-01; A-3967.)

These many similarities reinforce that the Second Circuit faced the same question as the Federal Circuit in *Hardie*, and the conflicting outcomes of the two cases present a clear circuit split.

This circuit split is particularly important because both cases involved enforcement of an arbitration

clause against a *government* entity, and both courts addressed arguments based on the defendant's governmental status. This is significant because the Federal Circuit makes law regarding the contractual obligations of the federal Government, *see United States v. Hohri*, 482 U.S. 64, 71-72 (1987), and the Second Circuit routinely decides contract cases involving foreign government entities, *see, e.g.*, *Capital Ventures Int'l v. Rep. of Arg.*, 552 F.3d 289 (2d Cir. 2009).[8] Indeed, Second Circuit law plays an especially large role in the context of international arbitration since New York is home to one of the world's three premier international arbitration centers, *see* Leon E. Trakman, *"Legal Traditions" and International Commercial Arbitration*, 17 Am. Rev. Int'l Arb. 1, 14 (2006), making New York "the most common location for international arbitrations in the U.S." Philip W. Engle, *Crafting International Commercial Arbitration Clauses*, ACCA Docket (July-Aug. 1995), at 20 n.10. Thus, the split divides the two primary circuits in which the issue presented is likely to arise.

As a result of the decisions below, moreover, Second Circuit law conflicts not only with *Hardie* but also with several basic legal principles. Assumption and estoppel have long existed as separate legal doctrines, and there is no basis for collapsing assumption into estoppel or for importing estoppel's reliance requirement into the analysis of assumption.

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[8] *See also, e.g., EM Ltd. v. Rep. of Arg.*, 473 F.3d 463 (2d Cir. 2007); *Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Federation*, 361 F.3d 676 (2d Cir. 2004); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000); *Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363 (2d Cir. 1999).

In addition, there is no basis to invoke special requirements for estoppel against government entities where, as here, doing so ignores the important distinction between a government's sovereign acts and its commercial acts.[9] It also ignores the distinction between estopping a government from denying statutory benefits that a government employee erroneously said were available, *see Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), *cited in* Pet. App. 14a-15a, and estopping a government from denying the obligations of a contract from which it took substantial and direct benefits, *cf. Gould, Inc. v. United States*, 67 F.3d 925, 930 (Fed. Cir. 1995) (where claimant's "rights are not premised on a statutory entitlement, but on a contract claim," it "would be stretching *Richmond* totally out of context to apply it"). And Second Circuit law, as it now stands, is contrary to the thrust of this Court's recent cases limiting the Government's ability to invoke special rules when

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[9] *See, e.g., FDIC v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (FDIC subject to estoppel when it "stands in the shoes" of insolvent banks) (internal quotation marks omitted); *Azar v. U.S. Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) (Postal Service subject to estoppel when it competes with private businesses); *FDIC v. Sarandon*, No. 91-CV-5109, 1992 WL 36132, at *1 (S.D.N.Y. Feb. 19, 1992) (Mukasey, J.) (government "should be as vulnerable as any other litigant to principles of estoppel" when "acting in a commercial and not in a sovereign capacity"); *see also Rep. of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614-15 (1992) (explaining history of the commercial distinction in context of sovereign immunity); *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824) (Marshall, C.J.) (describing it as a "sound principle, that when a government becomes a partner in any trading company, it devests itself . . . of its sovereign character, and takes that of a private citizen").

contracting with private parties. *See, e.g.*, *Winstar*, 518 U.S. at 895 ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.") (internal quotation marks omitted).[10] This issue is itself sufficiently significant to warrant review in this case. *See, e.g.*, *id.* at 860 ("We took this case to consider the extent to which special rules, not generally applicable to private contracts, govern enforcement of the governmental contracts at issue here.").

Furthermore, the Second Circuit substantially adopted the district court's misapplication of the "reasonable reliance" requirement even as it exists in the estoppel setting. Under the view adopted below, the lack of compliance with government contracting requirements created legal uncertainty *before* Petroecuador's many years of taking benefits under the JOA, and this initial uncertainty precluded reasonable reliance *regardless* of the parties' subsequent course of conduct. This ruling inverts the doctrine of estoppel. The proper analysis begins with the premise that the contract is at least arguably unenforceable at the outset of the parties' relationship, and it asks whether the charged party's acceptance of direct benefits under the contract gives

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[10] *See also Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002) (recognizing that "limitations principles should generally apply to the Government in the same way that they apply to private parties") (internal quotation marks omitted); *id.* at 141 ("The United States does business on business terms.") (internal quotation marks omitted); *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000) (holding that Government was liable to private parties under ordinary principles of contract repudiation).

rise to a reasonable expectation that the contract will *nonetheless* be respected. It is the merits (or demerits) of the waived contractual defenses that are irrelevant in answering this question, not the parties' subsequent conduct.[11]

A writ of certiorari, therefore, would allow this Court to resolve the conflict between Second Circuit law and these fundamental legal principles, as well as the conflict with the Federal Circuit's decision in *Hardie*.

This Court's review is warranted not only by these conflicts themselves, but also by the Second Circuit's complete failure to address them. The Second Circuit issued a summary order that lacked any independent reasoning but instead rejected Chevron's arguments "for substantially the reasons stated by the District Court." Pet. App. 2a. Yet the only analysis offered by the district court was the reasoning that *created* the conflicts. In adopting the district court's analysis, the Second Circuit addressed neither *Hardie* nor the legal principles, set forth above, that are irreconcilable with its decision. Worse still, by issuing a summary affirmance, the Second Circuit

[11] This is no novel proposition. For example, in *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 142 U.S. 396 (1892), this Court decided whether a company, after acquiring the assets of another company, was bound by a contract previously entered into by the other company. The Court observed that the acquiring company initially "was at liberty to renounce the benefit of such contract." *Id.* at 408. This lack of obligation at the outset, however, did not forever preclude reliance or render subsequent conduct irrelevant. On the contrary, the continuance of operations under the terms of the contract established the acquiring company's "adoption of such contract"—"or, at least, . . . [the acquiring company was] equitably estopped from denying that such was the case." *Id.*

has made clear that it views the disposition of this case as governed by settled circuit precedent. *See* 2d Cir. R. 32.1 cmt.[12] Yet the district court (and, thus, the Second Circuit) failed to point to any circuit precedent or decisions of this Court that even arguably control here. The disposition thus leaves Second Circuit law clear, but entirely unreasoned.

Already once this Term, the Court has granted certiorari to review an important issue that the Second Circuit dispatched in a summary order adopting the reasoning of the district court. *See Ricci v. DeStefano*, 129 S. Ct. 893, 894 (2009).[13] Indeed, this Court has not hesitated to take important cases in which the Second Circuit acted without published opinion.[14] Especially in light of this history, the

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[12] The order adopting Second Circuit Rule 32.1, dated June 26, 2007, states in part: "Summary orders are issued in cases in which a precedential opinion would serve no jurisprudential purpose because the result is dictated by pre-existing precedent. . . . Denying summary orders precedential effect does not mean that the court considers itself free to rule differently in similar cases."

[13] Faced with a *sua sponte* poll of the *en banc* Court, the *Ricci* panel converted its summary order to a *per curiam* opinion. *See Ricci v. DeStefano*, 530 F.3d 88 (2d Cir. 2008). Nevertheless, the panel continued to rely on the district court's reasoning, and six judges observed that this "perfunctory disposition rest[ed] uneasily with the weighty issues presented by th[e] appeal." *Id.* at 93-94, 96 (Cabranes, J., dissenting from the denial of rehearing *en banc*). And even the panel's original summary order in *Ricci* was far less problematic than the Second Circuit's decision here, because five judges in *Ricci* determined that the district court at least had applied "controlling [Circuit] authority." *Id.* at 90 (Parker, J., concurring in the denial of rehearing *en banc*).

[14] *See, e.g., Bd. of Educ. v. Tom F.*, 128 S. Ct. 1 (2007); *Massaro v. United States*, 538 U.S. 500 (2003); *Agostini v. Felton*, 521

Second Circuit's failure to address petitioners' arguments is a "depart[ure] from the accepted and usual course of judicial proceedings" that further supports a grant of certiorari, Sup. Ct. R. 10(a), or, were the issues here not so timely and important, a remand for the Second Circuit to address petitioners' arguments in a published opinion, *see Lawrence v. Chater*, 516 U.S. 163, 166-70 (1996).

II. THIS CASE RAISES IMPORTANT AND TIMELY LEGAL ISSUES THAT REQUIRE CLARIFICATION

Neutral arbitral forums are vital to the fair and impartial resolution of conflicts concerning transnational investment. As this Court has repeatedly recognized, "'[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)); *accord The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972) ("agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting").

The availability of a neutral arbitral forum is particularly important with respect to commercial dealings with a foreign government. Regrettably, a

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(continued...)

U.S. 203 (1997); *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603 (1991).

foreign country, having received the investment, has strong incentives to disregard its contractual obligations and force U.S. companies to seek redress in local courts with unsettled laws. Especially where the judiciary lacks independence, the process and outcome in local courts often will be tainted by political pressure to rule for the government over a foreign investor.

Ecuador is emblematic of the difficulties U.S. investors face in foreign legal systems. According to the U.S. State Department, "[t]here are over 55,000 laws and regulations in force" in Ecuador, and "[m]any of these are conflicting, which contributes to unpredictable and sometimes contradictory judicial decisions." *2009 Investment Climate Statement – Ecuador*, *available at* http://www.state.gov/e/eeb/rls/othr/ics/2009/117668.htm (last visited Mar. 7, 2009). This legal uncertainty is compounded by "[s]ystemic weakness and susceptibility to political or economic pressures in the rule of law": "The Ecuadorian judicial system is hampered by processing delays, unpredictable judgments in civil and commercial cases, inconsistent rulings, and limited access to the courts." *Id.* The proposed $27 *billion* judgment in the underlying Lago Agrio case brings these concerns with judicial independence and the rule of law into sharp focus.

Absent assurance that commercial disputes can be resolved in an impartial forum in accordance with the rule of law, investors will be chary of engaging in foreign commerce. Yet Second Circuit law now effectively eliminates assumption and incorporates a crabbed interpretation of estoppel, making it much easier for foreign countries to deal with U.S.

companies with their fingers crossed behind their backs. Specifically, Second Circuit law allows foreign countries to free themselves of their obligations to U.S. companies by pointing to uncertainties in their local laws. But it is precisely those local uncertainties that international arbitration is designed to overcome, *viz.*, having an independent panel—unaffected by parochial biases—resolve transnational disputes under settled law. The ruling below perversely subjugates the *predictability* of international law to the *unpredictability* of local law. The Second Circuit's decision will thus have a significant and negative impact both on U.S. corporations and on foreign commerce. Permitting foreign countries to exploit commercial contracts for decades with impunity will "invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages" and "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Mitsubishi Motors Corp.*, 473 U.S. at 631 (internal quotation marks omitted); *accord* Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID Rev.—Foreign Investment L.J. 19, 63 (1987) ("[I]t is hardly surprising that the contract appears a much more attractive proposition if it is subject to a neutral dispute-resolution mechanism.").

The decision below will also have lasting significance since the Second Circuit is a primary forum for disputes over international arbitration and commercial transactions involving foreign government entities. *See* p. 16, *supra*. As it effectively holds that the district court's decision

reflects settled law that is binding on future Second Circuit panels, *see* p. 20, *supra*, the summary order here will have a substantial effect on international disputes for years to come.

The question of a government's obligations to a private party with which it has a commercial relationship is only growing in significance given the unprecedented investment by the U.S. Government and foreign governments in private business as part of the ongoing bailouts.[15] Under the existing state of the law, the U.S. Government will be the only country to be bound by its conduct under the Federal Circuit's rule, while foreign nations will be able to act with impunity under the rationale adopted by the Second Circuit. The timeliness of this issue makes it all the more important for this Court to provide definitive guidance now.

In sum, the split of authority creates substantial uncertainty in an area that demands clarity. Whatever the merits of the parties' respective positions, there is an undeniable need for uniformity in the federal common law with respect to the application of assumption and estoppel where government entities enter commercial joint ventures.

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[15] *See, e.g.*, Matthew Ericson *et al.*, *Tracking the $700 Billion Bailout*, N.Y. Times (Mar. 2, 2009), *available at* http://projects.nytimes.com/creditcrisis/recipients/table?scp=15&sq=bailout&st=cse (last visited Mar. 6, 2009); Andrew MacAskill & Jon Menon, *Lloyds Cedes Control to Government, Insures Assets*, Bloomberg (Mar. 7, 2009), *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aUuK.B52o350&refer=home (last visited Mar. 7, 2009); *Fortis Reshaped by Government Bailout*, Int'l Herald Trib. (Sept. 29, 2008), *available at* http://www.iht.com/articles/ap/2008/09/29/business/EU-Netherlands-Fortis.php (last visited Mar. 7, 2009).

In these days of growing international commerce and unprecedented government involvement in the private sector, it is imperative that this Court provide clear guidance on the governing law.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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March 9, 2009

APPENDIX

United States Court of Appeals,
Second Circuit.

REPUBLIC OF ECUADOR and Petroecuador,
Petitioners–Counter–Defendant– Appellees,

v.

CHEVRONTEXACO CORPORATION and Texaco Petroleum Company,
Respondents–Counter–Claimants– Appellants.
No. 07–2868-cv.

Oct. 7, 2008.

UPON DUE CONSIDERATION of this appeal from a judgment entered in the United States District Court for the Southern District of New York (Sand, J.), it is hereby **ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

C. MacNeil Mitchell, Winston & Strawn LLP, New York, N.Y. (Eric W. Bloom, Tomas Leonard, Karen Sugden Manley, Nicole Y. Silver, on the brief, Winston & Strawn LLP, Washington, D.C.), for Petitioner-Counter-Defendant-Appellees.

Thomas F. Cullen, Jr. (Thomas E. Lynch, Jones Day, New York, N.Y., Donald B. Ayer, Gregory A. Castanias, Louis K. Fisher, on the brief), Jones Day, Washington, D.C., for Respondents-Counter-Claimants-Appellants.

PRESENT: Hon. JOSEPH M. McLAUGHLIN, Hon. GUIDO CALABRESI, Circuit Judges, Hon. JOHN F. KEENAN, District Judge.[1]

SUMMARY ORDER

Chevrontexaco Corp. and Texaco Petroleum Co. ("Appellants") appeal from the judgment of the United States District Court for the Southern District of New York (Sand, J.) granting summary judgment to the Republic of Ecuador and Petroecuador ("Appellees") and finding that there could be no binding contract by estoppel or assumption between Appellants and Appellees. *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F.Supp.2d 452 (S.D.N.Y.2007). We assume the parties' familiarity with the facts, procedural history, and scope of the issues presented on appeal.

We have considered all of Appellants' claims and, for substantially the reasons stated by the District Court in its careful and well-reasoned decision, find them to be without merit. Accordingly, we AFFIRM the judgment of that Court.

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[1] The Honorable John F. Keenan, United States District Court for the Southern District of New York, sitting by designation.

The REPUBLIC OF ECUADOR and Petroecuador, Plaintiffs, Counterclaim Defendants,

v.

CHEVRONTEXACO CORPORATION and Texaco Petroleum Company, Defendants, Counterclaim Plaintiffs.

No. 04 Civ. 8378(LBS).

United States District Court, S.D. New York.

June 19, 2007.

Charles MacNeil Mitchell, Winston & Strawn LLP (N.Y.), New York City, Eric Weston Bloom, Sarah M. Hall, Tomas Leonard, A. Manuel Garcia, Nicole Y. Silver, Winston & Strawn LLP (DC), Washington, DC, for Plaintiffs, Counterclaim Defendants.

Thomas F. Cullen, Jr., Gregory A. Castanias, Louis Karl Fisher, Michael L. Kolis, Jones Day (DC), Washington, DC, Thomas E. Lynch, New York City, for Defendants, Counterclaim Plaintiffs.

OPINION

SAND, District Judge.

Before this Court is a hearing pursuant to Rule 44.1 of the Federal Rules of Civil Procedure to determine issues of Ecuadorian law prior to ruling on

plaintiffs' motion for summary judgment entering: (a) judgment on plaintiffs' claims; (b) dismissing defendants' counterclaims; (c) permanently enjoining and staying defendants from continuing any arbitration proceedings in this matter; and (d) awarding plaintiffs such other and further relief as the Court deems just, as well as defendant's motion for summary judgment dismissing plaintiff's claims for a permanent injunction of arbitration. This Rule 44.1 hearing was ordered by the Court to determine whether an Ecuadorian court presented with the 1965 Joint Operating Agreement ("JOA") between Gulf Oil Company ("Gulf") and the defendants' predecessors would find, that plaintiff PetroEcuador's predecessor Compania Estatal Petrolera Ecuatoriana ("CEPE") became bound by the JOA in 1974 after taking over Gulf Oil's ownership interest.

Fed R. Civ. P. 44.1 Power

Federal Rule of Civil Procedure 44.1 governs how foreign law is determined in federal court. It provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Fed.R.Civ.P. 44.1. Rule 44.1 was enacted in 1966. Prior to its enactment foreign law was a question of fact; now it is a question of law, which means that it may be determined at the summary judgment stage

of litigation. *See* Louise Ellen Teitz, *The Use of* Evidence *in Admiralty Proceedings*, 34. J. Mar. L. & Com. 97, 104 (Jan.2003) (discussing the Federal Rules of Civil Procedure and methods of proof of foreign law).

Rule 44.1 places the burden on the party raising issues of foreign law to give "notice by pleadings or other reasonable written notice." "Since in Rule 44.1 there is no form specified for the notice, federal courts construe the requirement liberally." Teitz, 34. J. Mar. L. & Com. at 106. Both parties have over the course of this litigation made clear the need to determine what was permitted under Ecuadorian law in 1974 before the Court endeavored to undertake any analysis whether PetroEcuador could be bound to the JOA under the United States federal laws of estoppel. *See The Republic of Ecuador v. ChevronTexaco Corp.*, 376 F.Supp.2d 334 (S.D.N.Y.2005) (hereinafter *ROE I*); *The Republic of Ecuador v. Chevrontexaco Corp.*, 426 F.Supp.2d 159 (S.D.N.Y.2006) (hereinafter *ROE II*).

The advisory committee notes on Rule 44.1 suggest that courts are allowed great leeway in making a foreign law determination and provide that traditional evidentiary standards need not apply. Fed.R.Civ.P. 44.1, advisory notes ("The new rule permits consideration by the court of any relevant material, including testimony, without regard to its admissibility under Rule 43."). To this end, the Court undertook to determine pertinent Ecuadorian law at a foreign law hearing, which commenced on May 21, 2007 and concluded on May 24, 2007. The Court permitted each party ample time to brief the issues and allowed each party to present voluminous expert

testimony on the topic and to cross examine the opposing party's experts.

Both the Court's determination of Ecuadorian law and its partial ruling on the motion for summary judgment are set forth below; a portion of the summary judgment determination is set aside for the parties to reevaluate their posture.

Factual Background

This Court and other courts in the Second Circuit have, at multiple times and in various incarnations over the past 14 years, dealt with the underlying facts of this case. They are set forth in greater detail in other opinions rendered by this Court, *see ROE I; ROE II*, as well as by other courts in the Second Circuit when faced with a suit by a group of indigenous people in the Republic of Ecuador against the defendants in this case. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir.2002); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir.1998). A brief background of the case follows, as well as the facts pertinent to the issue presented here.

In 1965 the government of Ecuador granted an oil concession (the "Napo concession") to Gulf and the Texaco Petroleum Company ("TexPet"). Pursuant to the Napo concession Gulf and TexPet signed a Joint Operating Agreement (JOA) in 1965 for the drilling of the concession. Both Gulf and TexPet were American companies domiciled in Ecuador, and represented by local Ecuadorian counsel; however, the JOA was signed in Florida. The JOA provided for arbitration to be conducted pursuant to AAA rules in New York, and is the basis of Chevron's alleged right to engage plaintiffs in arbitration of the 1995 settlement agreement provisions.

In 1972 Ecuador's military assumed control of the government. In an effort to nationalize the state's oil industry, the government issued Supreme Decree No. 430 "which, *inter alia*, required TexPet and Gulf to agree to new oil concession contracts with the Republic and to relinquish a substantial percentage of Napo concession lands." *ROE I*, 376 F.Supp.2d at 339 (internal citations omitted). In 1974, 25% of Gulf's interest in the drilling of Ecuadorian oil was taken over by CEPE pursuant to a government edict following Supreme Decree No. 430, referred to by the parties as the "1974 Acta." "The 1974 Acta did not itself contain a clause providing for arbitration; it did, however, contain a clause stating that 'the totality of the activities that will develop in the Joint Operation will be regulated by an operating agreement entered into by the parties,' the effect of which the parties dispute."[1] *ROE I*, 376 F.Supp.2d at 340. The parties agree that neither CEPE nor PetroEcuador ever signed the 1965 JOA at this point, or at any other point going forward.[2] Therefore PetroEcuador can only be held to the terms of the JOA through the operation of law.

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[1] PetroEcuador contends that the 1974 Acta specifically contemplated execution of a JOA at a later date because it provided that all the activities to be performed "shall be ruled by an Operation Agreement to be subscribed to by the parties." (Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 6.)

[2] PetroEcuador alleges that the JOA was completely abolished as the result of a 1973 contract (which replaced the Napo concession) because it was ancillary to the Napo concession and was thus abolished alongside it. *ROE I*, 376 F.Supp.2d at 340; Pl.'s Mot. for Summ. J. at 41. The Court does not rest its decision on this ground and will not address how an Ecuadorian Court would rule on this ancillary contract claim.

For the next three years the parties drilled the fields, but by 1976 Gulf decided to sell its interest in the newest concession to CEPE. CEPE bought out the remainder of Gulf's interest on May 27, 1977. There was no mention of the JOA in CEPE's agreement to take over Gulf's interest. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 10.)

From 1977 through 1991, when a new JOA was agreed upon, Texaco and PetroEcuador operated the oil fields in conjunction with each other, with Texaco serving as the operator.[3] The parties attempted, but ultimately were unable until 1991, to agree upon a new JOA at various points during this interim operating period. At the start of negotiations for a new JOA in 1974, Chevron included provisions requiring arbitration, which were removed at the

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[3] Inexplicably, over the entire course of this three year litigation neither party has alleged that the 1991 JOA, which has no arbitration clause in it, supersedes the 1965 JOA or in any way governs this dispute. The Court asked the parties whether they intended to make any arguments along these grounds:

> THE COURT: And is there an argument being made that whatever existed prior to that time [pre-1991] the 1991 JOA now controls?
>
> MR. CULLEN [Chevron's attorney]: No, your Honor. There is a specific provision in the 1991 JOA that it shall control as of this date forward, as of the date of its execution for the operation.
>
> MR. MITCHELL [Ecuador's attorney]: Actually, your Honor, we had not considered that point. That is one of the-every time you turn around and look in this case another issue pops out, and frankly that is one that I had not thought about. Maybe I should have, but I haven't.

(Foreign Law Hr'g Tr. at 473, May 24, 2007.) Therefore the Court will treat any argument along these lines to have been waived.

behest of PetroEcuador. (*Id.* at 7.) Multiple drafts of new JOA's were exchanged by the parties over the 17 year interim period. (*Id.*) The question before the Court is whether an Ecuadorian Court would find that CEPE had assumed Gulf's rights and obligations under the JOA in 1974 so that arbitration before the American Arbitration Association ("AAA") in New York sought in 2004 would be mandated.

The present dispute finds its origin in a 1993 lawsuit instituted in the Southern District of New York by a group of indigenous people in Ecuador who sued defendants ChevronTexaco and Texaco Petroleum Company (referred to herein as "Chevron," except where noted) to compel the cleanup of their community's environmental resources which they allege were damaged by waste remaining after years of oil drilling on the land. After years of litigation in the American federal courts, the case was dismissed at Chevron's request on the grounds of forum non conveniens by the Second Circuit, with the caveat that Chevron consent to jurisdiction for a renewed suit in Ecuador. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir.2002). The first attempt by indigenous Ecuadorian plaintiffs to sue Chevron is referred to by the parties as the "Aguinda" litigation cases.[4] In 2003

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[4] The procedural history of the *Aguinda* litigation is detailed in *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir.2002), and *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir.1998). In *Aguinda* the Second Circuit found that the courts of Ecuador were perfectly capable of handling a tort claim. *Id.* at 477. This Court notes that the parties have assumed the other's respective position on forum for this litigation. In the Lago Agrio line of cases, Chevron preferred to have the courts of Ecuador hear the case instead of the courts of the United States and the Ecuadorian party wanted to keep the case in the United States. The extent to

the indigenous Ecuadorian plaintiffs renewed the Aguinda litigation seeking the same relief as that sought earlier, however this time from the courts of Ecuador. This renewed action is referred to by the parties as the "Lago Agrio" action.

While the Aguinda litigation was ongoing in this district the current plaintiffs and defendants signed a settlement in 1995 ("1995 Settlement") wherein TexPet agreed to perform certain environmental cleanup in exchange for a release of claims by Ecuador and PetroEcuador; in 1998 the 1995 Settlement was declared to be fully performed and concluded and the Government and PetroEcuador released Chevron and any related companies from "from any liability and claims by the Government of the Republic of Ecuador, PetroEcuador and its Affiliates, for items related to the obligations assumed by TEXPET in" the 1995 Settlement. *See ROE I*, 376 F.Supp.2d at 341-42 (internal citations omitted).[5]

Procedural History before this Court

The essence of the case at hand comes down to who will pay for the costs of any environmental cleanup which may be ordered by an Ecuadorian court at the behest of the Lago Agrio plaintiffs: defendants or Ecuador and its state-owned oil company PetroEcuador.

(continued...)

which the reversal of positions results from changes in the Ecuadorian government is not disclosed.

[5] The parties referred to TexPet alternately as Texaco both in their papers and at the hearing.

On June 11, 2004, to determine who would bear the burden for the cleanup sought in the Lago Agrio litigation, Chevron instituted arbitration proceedings with the AAA seeking indemnification of any adverse judgments and associated costs of litigating the Lago Agrio case, as well as contractual damages for violating the terms of the 1965 JOA.

On October 15, 2004 plaintiffs commenced suit in New York Supreme Court seeking to stay permanently the arbitration proceeding before the AAA; on October 22, 2004 defendants removed the case to the Southern District of New York. Chevron counter-claimed alleging a breach of contract by Ecuador for failing to indemnify it as it allegedly contracted to do pursuant to the 1995 Settlement.

In *ROE I*, this Court denied Ecuador's motion for summary judgment. Chevron claimed at the time, and continues to claim today, that PetroEcuador is estopped from denying that it is bound to the JOA because it acted in a manner consistent with the JOA in the day to day operation of the concession and received benefits from operation during the years following 1974. The Court found that application of federal common law to the question of whether Ecuador, a nonsignatory to the original arbitration agreement was bound to arbitrate this dispute raised genuine issues of material fact as to whether Ecuador could be bound through principles of estoppel to the 1965 JOA. The Court wrote:

> Under federal common law, the Second Circuit "has recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."

Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir.1995). "[A] willing signatory (such as [TexPet]) seeking to arbitrate with a non-signatory that is unwilling (such as [PetroEcuador]) must establish at least one of the five theories described in *Thomson-CSF*." *Merrill Lynch Inv. Managers*, 337 F.3d [125,] at 131 [(2d Cir.2003)].

Of the five *Thomson-CSF* theories, the most likely to apply in this case is estoppel. "A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir.1999) (citing *Thomson-CSF*, 64 F.3d at 778-79). Direct benefits are those "flowing directly from the agreement," while "the benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relation of parties to an agreement, but does not exploit (and thereby assume) the agreement itself." *MAG Portfolio Consultant, GMBH, v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir.2001). "To prevail, then, [Defendants] must show that [PetroEcuador] 'knowingly exploited' the ... contract and thereby received a direct benefit from the contract." *Id.* at 62 (quoting *Thomson-CSF*, 64 F.3d at 778).

ROE I, 376 F.Supp.2d at 356. The Court then examined the applicable evidence and determined that there was a genuine issue as to the material fact

of whether Ecuador was in fact estopped from arguing that it could not be bound to the 1965 JOA.[6]

The Court then held a hearing to determine whether there was a conflict of law between the laws of Ecuador and New York law in relation to the 1995 settlement which was raised in defendant's counterclaim and subject to a motion to dismiss held over from *ROE I.* Finding no conflict and therefore applying New York law to the breach of contract claim, the Court stated "that any assessment of the intent of the parties in agreeing to the 1995 and 1998 releases must take into consideration the Ecuadorian law at the time of the releases and the Ecuadorian context in which the parties were acting." *ROE II,* 426 F.Supp.2d at 164.

The Current Dispute

Plaintiffs now claim that Ecuadorian law precludes any reasonable belief by Chevron that CEPE agreed to the JOA; this contention, if true, would in effect end the question of arbitrability in this case and make any analysis of the facts of this case under the federal laws of estoppel not needed. Ecuador and PetroEcuador allege that the terms of the 1965 JOA cannot bind them to arbitration in New York because they were not signatories to the original contract and could not become a party to it, under (1) Ecuadorian government contract law, (2) the Ecuadorian constitution then in effect, or (3) can by their course of conduct be found to have assumed the terms of the

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[6] Both parties have expanded the issues beyond binding arbitration through estoppel and now also make conflicting arguments as to whether or not PetroEcuador can be bound through assignment of the 1965 JOA. This has raised more issues of Ecuadorian law as well.

JOA. Chevron disagrees as to the result under Ecuadorian law in all three areas.

While the Court previously stated that federal principles of the American law of estoppel would apply, it is impossible to properly analyze an estoppel claim in American law without reference to the underlying Ecuadorian law because estoppel, particularly when sought against a governmental entity or the government itself, can only lie where there is reasonable reliance.

Federal Law of Estoppel against the Government

As we have noted after a study of Second Circuit law, the federal common law of arbitration agreements would apply to this case. *ROE I*, 376 F.Supp.2d at 353-56.

Neither party attempts to argue that PetroEcuador is bound (or not bound) to arbitrate by incorporation by reference, agency, or veil-piercing/alter ego. Instead, the parties concentrate their arguments on assumption by assignment and assumption by estoppel, meshing categories 2 and 5 of the Thomson-CSF analysis. Generally, a party may be bound to an arbitration clause only through "ordinary principles of contract and agency" *Thomson-CSF*, 64 F.3d at 775. However, the laws differ when the party estopped is a government entity, as is the case with PetroEcuador.

Neither party cites any cases where estoppel is applied against a foreign government by an American court.

In *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) the Supreme Court maintained its longstanding policy of not allowing estoppel claims to proceed against the

American government in instances where the government's agent did not have authority. The Court held "payments of money from the Federal Treasury are limited to those authorized by statute" and therefore erroneous oral and written advice from an agent of the government would not suffice for an estoppel claim. *Id.* at 415, 110 S.Ct. 2465. Though the Court has not laid down a blanket rule precluding every estoppel claim, it has reversed every finding by a lower court of estoppel against the government. *Id.* at 422, 110 S.Ct. 2465.

The Court refuses to tamper where Congress has not authorized expenditures in public contracts:
" 'not even the temptations of a hard case' will provide a basis for ordering recovery contrary to the terms of the regulation, for to do so would disregard 'the duty of all courts to observe the conditions defined by Congress for charging the public treasury.' " *Id.* at 420, 110 S.Ct. 2465 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385-86, 68 S.Ct. 1, 92 L.Ed. 10 (1947).).

The Court did not find persuasive arguments as to the faith the public would place in officials if their word was not binding:

> To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.
>
> Also questionable is the suggestion that if the Government is not bound by its agents' statements, then citizens will not trust them, and will instead

> seek private advice from lawyers, accountants, and others, creating wasteful expenses. Although mistakes occur, we may assume with confidence that Government agents attempt conscientious performance of their duties, and in most cases provide free and valuable information to those who seek advice about Government programs.

Id. at 433, 110 S.Ct. 2465.

The Court has left open the possibility "in the course of rejecting estoppel arguments, that some type of 'affirmative misconduct' might give rise to estoppel against the Government." *Id.* at 421, 110 S.Ct. 2465 (citing *INS v. Hibi*, 414 U.S. 5, 8, 94 S.Ct. 19, 38 L.Ed.2d 7 (1973)) (per curiam). After reviewing a series of cases (primarily against the IRS) from various circuits (but not the Supreme Court) the Third Circuit articulated a test for determining whether there was the additional affirmative misconduct needed to find estoppel against the government:

> Although the Supreme Court has neither rejected outright nor articulated a specific test for estoppel claims against the government, the foregoing case law illuminates certain factors beyond the traditional elements of estoppel that we should consider before estopping the IRS. Those factors are: 1) the impact of the estoppel on the public fisc; 2) whether the government agent or agents who made the misrepresentation or error were authorized to act as they did; 3) whether the governmental misconduct involved a question of law or fact; 4) whether the government benefitted from its misrepresentation; and 5) **the existence of**

irreversible detrimental reliance by the party claiming estoppel.

Fredericks v. Commissioner, 126 F.3d 433, 448-49 (3d Cir.1997) (emphasis added). It is basic horn book law that for a claim of detrimental reliance to succeed, any reliance leading to the detriment must be reasonable. (Restatement 2d of Contracts, § 90)

Before an American court could hold that plaintiffs are estopped from denying that they are bound to the 1965 JOA it would have to find any reliance by defendants on the laws of Ecuador (by whose operation it seeks to bind a nonsignatory to a contract) was reasonable. Where the law is unsettled or unclear, an American court must determine how a court in Ecuador would rule on the law upon which the defendant seeks to rely. Therefore, if the laws of Ecuador either precluded contracting with the state without certain formalities, did not recognize estoppel or arbitration, or in any way made it unreasonable for Chevron to assume the existence of the JOA, then there is no way for Chevron to estop CEPE from denying an obligation to arbitrate. In the event that the JOA is not binding on PetroEcuador summary judgment would be appropriate, as defendants could prove no genuine issue as to any material fact regarding an agreement to arbitrate in New York.

Today the Court holds that an Ecuadorian court looking at the arbitration provision in the 1965 JOA would find it not binding upon PetroEcuador for the reasons set forth below.

Ecuadorian Law Relied Upon by the Parties

The parties agree that CEPE did not sign the 1965 JOA, a contract executed in Florida between two American corporations, either in 1965 or 1974 when the Acta was executed.

Chevron's complex argument for why the JOA's provisions apply to PetroEcuador draws on diverse areas of both Ecuadorian and international law. The argument can be broken down into three parts: (1) any requirement that government contracting procedure needed to be followed is inapplicable in contracts assumed by the state or its agencies; (2) the Ecuadorian constitution in 1974 allowed for the state or its agencies to agree to engage in arbitration outside the confines of Ecuador; and (3) that CEPE and PetroEcuador's course of conduct along with the universal requirements of good faith and the "actos proprios" doctrine (defined *infra* p. 21) binds PetroEcuador to the JOA.[7]

The Court finds the state of Ecuadorian law to have been too unsettled in 1974 for the above propositions to support Chevron's position. Further, even if the Court held that an Ecuadorian court would find Chevron's interpretation of the laws of Ecuador correct, Chevron has proffered no evidence

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[7] Naturally, PetroEcuador and Ecuador disagree with all three of these points. They allege that: (1) any agreement with CEPE, like the JOA, would be a public contract (except in very limited circumstances), which means that a series of formalities mandated by Ecuadorian law must be followed, none of which were followed here; (2) arbitration in New York subjects Ecuador to foreign jurisdiction which was forbidden at the time by the Ecuadorian constitution; and (3) the actos proprios doctrine and the universal maxims proffered by Chevron have no bearing on the current dispute given Ecuador's own local law.

which shows that it actually believed the JOA bound CEPE at relevant times. Indeed, evidence to the contrary has been presented. Chevron's own expert states that this is fatal to any reasonable expectation claim (to the extent it exists) under Ecuadorian law. This is to say, that even in Chevron's best case scenario, it still cannot show that under Ecuadorian law CEPE or PetroEcuador would have the JOA enforced against it because there would be a lack of any reasonable expectation by Chevron that the JOA had continuing validity. Below the Court sets forth the arguments by the parties as to each issue in Chevron's analytical framework.

Government Contracting Procedure in Ecuador

The parties agree that Ecuadorian law mandates extensive formalities be followed before any government contract will be enforceable. There is no dispute that PetroEcuador and its predecessor CEPE are or were public entities. The parties disagree as to whether the formalities needed to be followed here, where CEPE bought out a signatory to a contract between two non-governmental entities. The question for the Court is would an Ecuadorian court require the parties to have complied with government contracting formalities for the JOA to bind PetroEcuador.

The parties agree that none of the formalities required in certain government contracts were followed. This would prove fatal to any claim as to the binding nature of the JOA only if the formalities were meant to be followed for a contract like the JOA. The extensive formalities for entry into a government contract for the drilling of oil included the following requirements: (1) the contract must be express; (2) in

writing; (3) executed by the board and General Manager of CEPE after first securing a favorable report from the Attorney General, the Comptroller General, the National Security Council, the Joint Command of the Armed Forces; (4) consideration and approval from the President of Ecuador along with the Presidential authorization; (5) submission of all parties to the jurisdiction of Ecuadorian courts; (6) express waiver of any diplomatic protection by a foreign private party; (7) execution of a notarized contract; and (8) recordation of the contract with the hydrocarbons registry. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 31-32.)

PetroEcuador alleges that the formalities had to be followed or else any alleged contract is an absolute nullity because CEPE was a public entity entering into a contract for oil drilling (See Eguigueren/Albán Decl. ¶ 59.). Chevron disagrees on two grounds: (1) that the contract, if the formalities had to be followed, was later ratified under the civil law by PetroEcuador's course of conduct and (2) that the formalities did not need to be followed because this was not the type of contract contemplated by the code to require the relevant formalities.

Chevron presented the testimony of two Ecuadorian law experts regarding the formalities, Professor Luis Parraguez and Dr. Jorge Zavala. Professor Parraguez presented himself as an expert in Ecuadorian civil law of contracts. However, Professor Parraguez explicitly stated that he is not an expert in government contract law. (Foreign Law Hr'g Tr. at 217-18, May 22, 2007.) While it may be a truism that Professor Parraguez's testimony regarding the ratification of a null contract would

only become relevant if the contract to be ratified was indeed null, the only way for the JOA to be null as a contract would be for it to be lacking in formalities,[8] which would place it under the purview of a government contract, an area where Professor Parraguez disclaims expertise.[9] Therefore for Chevron to carry the day here it must be that formalities are required for some contracts entered into by CEPE, a public entity, but that the provisions of this particular contract are ones that would not need to pass the above quoted approval.

To that end Chevron called Dr. Zavala, an expert in Ecuadorian law and a former Ecuadorian judge and professor. Dr. Zavala contends that CEPE is allowed to engage in both private and public contracting; the way to distinguish in which realm CEPE, or any other state agency is acting, is to look at the statute creating the agency, which gives it its purpose. (*See* Foreign Law Hr'g Tr. 284, May 23, 2007.) "[T]here is only an administrative function or purpose when administrative power is being exercised or authority is being exercised." (*Id.* at 285-

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[8] The contract could also be unconstitutional; the unconstitutional grounds for the contract are discussed, *infra* p. 18, with regards to whether the constitution in place in 1974 would have permitted CEPE to submit itself to foreign arbitration. As will be seen below, the relevance of the constitution only arises if CEPE is a state entity, which means that government contract formalities would once again be implicated.

[9] Any possible ratification of the JOA through PetroEcuador's course of conduct is addressed in the analysis of the actos proprios doctrine, *infra* p. 21. Further, if the JOA was a contract purely between two private parties, then the actos proprios doctrine would apply as well.

86.) Dr. Zavala was then asked what power CEPE was using in 1974:

> A: ... CEPE being an entity of public law when in 1978-'74 it entered into the agreement, it had a public purpose, which was the exploration, production, transportation, marketing, storage of petroleum and gas, hydrocarbons.
>
> And in regards to those activities, CEPE was and has always been regulated or governed by public law. And I ratify what Dr. Eguigueren [PetroEcuador's expert] said that CEPE had two positions.
>
> On the one hand, in granting a concession on behalf of the state, and then another position which it adopted as a concessionaire, and CEPE decides to become part of the consortium as a result, when it joins the JOA, the concession agreement, it adopts the purposes of the JOA, which was to coordinate, to organize, and administer the activities of the concessionaires. That purpose, the purpose of the JOA, is not the specific purpose of CEPE or object of CEPE ...
>
> So my position is, my view is, that within the concession, it had public power, a public purpose, and a public object. But in the JOA, when it operated with Texaco and Gulf and then thereafter just with Texaco, this was an activity without public authority, that is, a private activity, and in private activities such as submitting to the administrative rules and that activity of the JOA has an indirect activity—has an indirect relationship to the purposes of the concession itself; that is to say, it's an instrument.

(*Id.* at 286-87.) Dr. Zavala goes on to state that it is not the identity of the contracting party, but the purpose of the contract, which governs what area of the law the contract falls into. For example "a private person does not become a public authority because he obtains authorization from the state. What matters is that a private person, [i.e.] Jorge Zavala, is exercising authority for a public purpose, and therefore is under public law." (*Id.* at 289.) This point is well taken. But when applied to this case, the law as interpreted by Dr. Zavala becomes illogical. The purpose CEPE had was for the "exploration, production, storage, and transportation of petroleum" (*Id.* at 389.) which was covered by the 1973 concession, therefore Dr. Zavalla believes the JOA was a contract not within CEPE's purpose and was "made to be able to administer or organize that purpose, that object ... between those parties [CEPE and Texaco]." (*Id.* at 390.) According to Dr. Zavala, CEPE was created to exploit oil fields, but any contract it signed to meet its purpose is purely incidental and hence just a matter of private contract law.

> CEPE's purpose is not to enter into partnerships. CEPE's purpose is to explore, produce, market, store, and sell hydrocarbons. That is the direct and immediate purpose. If it has to carry out other activities or enter into other contracts to achieve those purposes, it is then obvious that that [sic] for is an indirect purpose.

(*Id.* at 392.) A law of this sort is odd, at best. Any and all outsourcing then falls outside the purview of the extensive checks mandated by the nation's laws. Essentially, a crafty government employee could set up a corporation and, without any oversight, contract

to exploit the natural resources of his country which the rest of the government was attempting to nationalize. While Dr. Eguiguren did in fact testify that CEPE was entitled to enter into private contracts without going through the formalities required in a government contract, Dr. Eguiguren limited the instances where this could occur to much more incidental decisions or contracts, such as contracts for uniforms, not contracts which enabled the governmental agency to carry out precisely what it was created to do.

Finally, PetroEcuador argues that the 1991 JOA was duly recorded in the hydrocarbon registry, while the 1965 JOA was not. (*See* Foreign Law Hr'g Tr. 380, May 23, 2007; ex. 72 (signature page of 1991 JOA showing registration).) The Court finds this fact compelling as evidence that a JOA would need to follow the formalities required by law, and is more than just a contract between two private parties when the state becomes involved. Coupled with the odd result contemplated by Dr. Zavala's interpretation of the government contract scheme in Ecuador, the Court is strongly inclined to side with PetroEcuador here: formalities would be required in a contract like the JOA. Because the formalities were not complied with, an Ecuadorian court looking back to 1974 would likely rule that the JOA was not binding on PetroEcuador. Even if formalities were not to be required in this instance by an Ecuadorian court, there is substantial disagreement amongst the experts as to whether the JOA, even if completely valid procedurally, would be constitutional.

Constitutionality of the Arbitration Clause in the 1965 JOA

After 1972's *coup d'etat* Ecuador's military government reinstituted the country's 1945 Constitution; this constitution was in effect from February 16, 1972, until August 9, 1979. (*See* Eguiguren/Albán Decl. at 22; Aff. of Rodrigo Jijón-Letort and Diego Pérez-Ordóñez at 2.) The 1945 Constitution contained a clause which read "[s]ubmission to a foreign jurisdiction shall be prohibited in all contracts executed in Ecuador by foreign parties with the Government or with public law entities." (*Id.*) Arbitration has long been recognized as a means for settling disputes in Ecuador, but the question here is, assuming the JOA was otherwise valid and bound CEPE, would a court in Ecuador find that the prohibition of submission to a foreign jurisdiction include the public entity CEPE agreeing to arbitrate in New York pursuant to the rules of the AAA and governed by New York law? PetroEcuador alleges that submitting to any arbitration outside the physical borders of Ecuador would have been unconstitutional at the time that CEPE is alleged to have entered into the JOA. Chevron argues that arbitration, rather than litigation, outside of Ecuador is not submission to foreign jurisdiction. There are no cases directly on point from the Ecuadorian courts; thus this issue is again one of expert debate and analysis.[10]

Dr. Eguiguren testified that laws, when issued, must conform to the constitution; here, the applicable

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[10] The parties argue as to the relevance of several Ecuadorian cases, all of which the Court finds to be no more than dicta. (*See* Foreign Law Hr'g Tr. 112, May 21, 2007.)

hydrocarbon law provided that CEPE's contracts could only be adjudicated by the courts of Ecuador. (Eguiguren/Albán Decl. at ex. 7; *See* Foreign Law Hr'g Tr. 36, May 21, 2007.)[11] This was because any adjudication outside of Ecuador would violate the 1945 Constitution. Dr. Eguiguren states that "international arbitrations are not courts of the country." (Foreign Law Hr'g Tr. 45, May 21, 2007.) The hydrocarbons law requires the courts of Ecuador to exercise their jurisdiction. (*Id.*)

Ecuador's 1998 constitution allows for submission to foreign jurisdiction for arbitration in the case of international agreements. (*See* Foreign Law Hr'g Tr. 35, May 21, 2007 (testimony of Dr. Eguiguren).) PetroEcuador argues that this means that foreign jurisdiction included arbitration in 1974, hence the need to clarify the availability of arbitration in foreign jurisdictions today.

PetroEcuador also presented the testimony of Professor Alejandro Garro who stated that the "arbitration clause, to the extent that it complies

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[11] The law reads:

> Foreign companies willing to execute contracts contemplated [under the Hydrocarbons Law] must establish domicilie in the country and comply with all requirements prescribed in applicable laws. These Foreign companies shall be subject to the jurisdiction of the country's courts and shall expressly waive their rights to file a claim by diplomatic channels. Such jurisdiction and waiver shall be impliedly included in any contract entered into with the State or CEPE

(Hydrocarbons Law of 1971, Art. 24; Eguiguren/Albán Decl. at ex. 7). By 1974 this provision of the hydrocarbons law had been moved to article 25 but contains the exact same wording. (*Id.* at ex. 8.)

with the requirements that are outlawed by the Constitution, are not valid nor enforceable in Ecuador and no award rendered on the basis of such clause would be recognized or enforced in Ecuador." (Foreign Law Hr'g Tr. 406, May 24, 2007). Professor Garro's reading of the 1945 Constitution and its bar on public entities entering into arbitration in foreign jurisdictions was informed by reference to the "Calvo Doctrine," a 19th century theory which posited that disputes with foreigners in Latin American countries should be decided not by guns or by unsympathetic foreign courts but by submission of the foreign nationals to the courts of the Latin American country. (*See Id.* at 404-06.) Professor Garro testified that "Ecuador is definitely one of the countries more reluctant to give up this 19th century view of Calvo which forces disputes in which the state or instrumentalities intervene to be solved in local courts and/or local law." (*Id.* at 405.)

Professor Garro then stated that in theory, arbitration might never come before the courts of a foreign jurisdiction. In practice, however, arbitration falls under the jurisdiction of the courts when parties challenge arbitral jurisdiction, the freezing of accounts, or the later enforcement of an arbitration award. (*Id.* at 410.)

Foreign jurisdiction in Ecuador is strictly defined by the locus of the event, according to Professor Garro. Two Ecuadorians agreeing to conduct an arbitration in a private conference room with Ecuadorian arbitrators using Ecuadorian law, if the conference room is in Peru, would be a foreign arbitration, because it is taking place beyond the physical borders of Ecuador. (*Id.* at 450.) Arbitration

conducted in Quito, Ecuador, with two New York parties using New York law and AAA rules would not be foreign jurisdiction. (*Id.*) Professor Garro disagrees with Dr. Zavala that the nationality of the arbitrators would have any effect on the foreign or domestic nature of the arbitration. (*Id.* at 427; *See* Foreign Law Hr'g Tr. 310, May 23, 2007 (Zavala's direct testimony).)

Chevron's experts vigorously contest these points. Dr. Zavala argues arbitration does not fall under foreign jurisdiction because it does not require submission to a foreign sovereign power. (*See* Foreign Law Hr'g Tr. 298, May 23, 2007.)

> When the Constitution of the Republic of Ecuador, in the many years it has been referring to a foreign jurisdiction, has been referring to a principle whereby no one who is part or belongs to the part of the sphere of the state can be subject or under the jurisdiction of judges or courts in a foreign nation, and that had been the prohibition or the limitation that had been imposed insofar as the state is concerned.

(*Id.*) Chevron's argument is not unreasonable as to the difference between arbitration and submission to a court of a foreign jurisdiction directly, particularly when viewing arbitration in an ideal setting where the courts need not interfere. At the same time, Ecuador's later change of the Constitution to expressly allow the type of arbitration sought here, as well as the removal of arbitration clauses from JOA negotiations, cuts against Chevron's argument. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 7.) The state of the law of Ecuador in 1974 on arbitral

matters would be too unsettled for any reliance to be reasonably maintained.

Actos Proprios and International Law

The final battleground amongst the experts is Chevron's contention that although estoppel as understood by American courts does not exist in Ecuador, a close approximation can be found in the actos pro-prios doctrine, or in maxims of universal law.[12]

Dr. Zavala summarized the actos proprios doctrine for the court and compared it to estoppel.

> This is the same as the, as estoppel in Anglo-Saxon law, and I'm referring here only to estoppel by representation, with a notable difference that explains this issue.
>
> In estoppel by representation, as my U.S. colleagues know better, it's required that the initial behavior provoke or that in reliance on that initial behavior the other party engage in a behavior that is detrimental to them, and this is not allowed by estoppel
>
> In the rule of actos proprios, it isn't required that the other party change its course of action. It's only necessary or required that there be an initial behavior by one party and not hearing whether the other party contradicts that behavior.

(*Id.* at 321-22.) One can see how the actos proprios doctrine when paired with Chevron's interpretation

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[12] Professor Andreas Lowenfeld testified on the potential use of maxims of universal law for gap filling by the courts. As one can see there is disagreement amongst the experts as to how the Court should interpret the laws of Ecuador; universal maxims, though of interest, do not solve the question before the Court.

of the law and facts of the instant case, would be an appealing doctrine for defendants. Application of the actos proprios doctrine does require an analysis of reasonable expectations of the parties, however, which reliance the Court finds lacking here.

Dr. Eguiguren does not disagree with Dr. Zavala's recitation of actos proprios, but does not believe it should apply to the JOA. (*See* Foreign Law Hr'g Tr. 64, May 21, 2007.) Dr. Eguiguren states that the first time the actos proprios doctrine appears in Ecuadorian law is 1994, which would be twenty years after the time period this Court's hearing addressed.[13] (*Id.*) The Court need not resolve this conflict because it finds that there could be no reasonable reliance on the JOA even if the actos proprios doctrine was recognized in Ecuador in 1974.

Reasonable Reliance

On the third day of expert testimony on Ecuadorian law the parties posed a series of hypotheticals to Dr. Zavala. Dr. Zavala was of the belief that the JOA governed the parties' course of conduct. In response to a hypothetical Dr. Zavala stated that "if I am Texaco and Gulf and were negotiating a new proposed JOA, I asked myself, what rules are governing my relationship throughout all of this time. And I come to the certain conclusion that it is the JOA."[14] (Foreign Law Hr'g Tr. at 361,

[13] Perhaps this explains why no mention of the doctrine was made until the Court requested papers from the parties.

[14] PetroEcuador contends that the 1973 concession, the 1974 Acta, various operations manuals Texaco had covering payroll and other day to day issues, and certain Ecuadorian hydrocarbon laws were used to govern the oil drilling during this period. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 9.)

May 23, 2007.) When asked what would result if the Ecuadorian state or its representatives had informed Gulf or TexPet that it was operating without an agreement on an ad hoc basis, Dr. Zavala responded that it would not change his opinion that there was a legally binding JOA because "perhaps what is missing is the legal, reliance on a written document, but not the expectations....they would have a legitimate expectation that there was an agreement." (*Id.*) Therefore the focus of an Ecuadorian court's inquiry should not be on CEPE's belief, but on TexPet's.

When the hypothetical was changed to address the situation which occurred here, where Gulf told TexPet that the parties were operating on an ad hoc basis, Dr. Zavala's answer changed:

> Q: If the Gulf and Texaco employees complained that operations were impaired because decision making was difficult because there was no legally binding joint operating agreement, does that change your conclusion?
>
> A: If I have evidence that responsible officials or representatives had behaved in the way that you describe.... Well, yes, I would lose the confidence that I had, the expectation that I had, if I had proof that responsible parties felt that way.

(*Id.* at 362.) PetroEcuador has submitted evidence that this occurred, where both Texaco and Gulf complained about the oil drilling partnership which resulted from the 1974 Acta. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 8.)

In 1974, when CEPE began to take over Gulf's interest in the Napo concession, through Gulf's final sale of its interest in 1977, Gulf expressed to the

parties the view that a new JOA should be negotiated, as it was of the belief that 1965 JOA had been cancelled by the 1973 concession. (*Id.* at 42.) Gulf further advised the parties that it had been operating on a de facto basis with Chevron since the 1973 concession without a functioning JOA while it was still a member of the three party oil drilling group with Chevron and CEPE. (*Id.* at n. 29.) Gulf and Texaco's local representatives in Ecuador sent their offices in the United States a joint telex complaining about the ad hoc nature of the oil drilling operation since the 1974 Acta's enactment which made negotiations interminable. (*Id.* at 8.) TexPet's cash call letters to PetroEcuador made no reference to the JOA, whereas its cash call letters to Gulf did make reference to the JOA; Gulf would respond to TexPet's cash call letters by advising it that it viewed the JOA as having been terminated. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 8.) The above facts, taken as a whole, mean that at the very least Gulf doubted the validity of the JOA when CEPE began to replace it, and that Gulf had made Chevron aware of this.

PetroEcuador's internal memoranda viewed the JOA as referential in nature, and expressed doubt as to whether PetroEcuador, short of signing a new JOA, could force a change in the agreement to make itself operator. (*See* Pl.'s Mem. of Law in Supp. of Mot. for Summ. J. at 10-11.) However, though PetroEcuador's own internal analysis of the JOA serves to bolster the view that the JOA would not be found binding, it is enough under Dr. Zavala's analysis for Gulf to have had internal doubt. He believes one should look at behavior, not at the silence, of the potentially estopped party

when making a reasonable expectation analysis. (*See* Foreign Law Hr'g Tr. at 356-57, May 23, 2007.)

Lack of reasonable expectation on the part of Chevron would eliminate the need for any universal maxims of law or any doctrines cited to by Dr. Zavala.

Q: Let's assume, assume hypothetically, that it is proven to your satisfaction [that Gulf and/or TexPet did not believe the JOA was binding]. In any of the doctrines that you had in your declaration or the universal law of principles cited by Professor Lowenfeld, are there any of these maxims or doctrines that would cause you to believe that there was a binding [JOA] under those factual assumptions?

A: Not on the basis of the fact that you described.

(Foreign Law Hr'g Tr. at 362-63, May 23, 2007.)

The Court then summarized a series of hypothetical questions which were posed to Dr. Zavala, and the following colloquy took place:

THE COURT: ... We are talking about whether under Ecuadorian law the [C]ourt would hold the prior JOA continues as a binding contract, and you talk of, that there would have to be actual or real expectations that there was an existing JOA in force.

And then the questions were asked as to what circumstances would support a conclusion that there were reasonable expectations that there was an agreement. Then you were asked if Gulf and Texaco complain that the operations were difficult because there was no JOA what the consequence of

that would be, and you said that you would lose confidence. I take it lose confidence that there was a reasonable expectation that there was an agreement in force if the responsible parties felt that there was no agreement in force and that that was creating problems.

My question is, does it make any difference whether Gulf and Texaco employees are complaining amongst themselves or whether there is communicated to CEPE the view that the absence of a JOA was creating problems?

THE WITNESS: I will answer it. If there is a conviction, an understanding that there is no JOA, there is no confidence that has been caused by the actions.

THE COURT: And this is true regardless of whether Gulf and Texaco complain to CEPE or whether this is something that they discuss among themselves?

THE WITNESS: It would have been the same if they would have conversed among themselves or stated that there was a lack of expectation or confidence of this JOA. It would have been the same result.

(*Id.* at 363-65.) Counsel for PetroEcuador expanded on Dr. Zavala's answers to the Court's questions with the following scenario, which mimics the events that took place from 1973 through 1977:

Q: Would it add or detract or not influence your opinion if I added to this assumption, these assumptions, the assumption that during this period Gulf representatives in Ecuador, in writing, had written to Texaco employees stating that there

was no JOA in place, and had put that writing, put that into letters to Texaco?

A: Obviously the confidence would diminish.

(Foreign Law Hr'g Tr. at 365, May 23, 2007.) Once Gulf or Texaco believed the JOA was not in force later discussions with PetroEcuador in order to sign a new JOA, or any course of conduct subsequent to the internal evaluation that the JOA would not apply, would have no effect.

THE COURT: Now, the additional fact is that the parties were negotiating a new JOA, which would seem to strengthen the view that there was no existing JOA. [What result?]

THE WITNESS: ... if one was confident that there was not a JOA in effect, and they continue negotiating for a new JOA, of course there is no confidence that there is a JOA in existence.

(*Id.* at 368.) The course of conduct of the parties in their day to day operations becomes irrelevant if the party seeking to estop the government from denying the existence of a contract does not itself believe, for whatever reason, that the contract is binding on the government. That is the case here.

Even if Chevron's analytical framework for binding CEPE were to hold (i.e. formalities were not required in this contract because it was a contract not for the express purpose for which CEPE was created, and an agreement to arbitrate in New York was constitutional), Chevron would still need the Court to find that PetroEcuador was bound to the JOA through its course of conduct via the actos proprios doctrine. The Court cannot do that because it finds that an Ecuadorian court would find no reasonable

expectation on Chevron's part that the JOA would bind CEPE in 1974 to arbitration in America sought for the first time in 2004, and therefore there can be no arbitration.

Summary Judgment Standard

A court may grant summary judgment only where the moving papers and affidavits submitted by the parties show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Brown v. City of Oneonta*, 106 F.3d 1125, 1130 (2d Cir.1997).

Conclusion

This Court is of the opinion that an Ecuadorian court would not find the JOA binding on CEPE in 1974. Because an American court applying federal law would not require arbitration if under Ecuadorian law this was not an available remedy, there is no genuine issue as to the material fact of whether the JOA serves to bind PetroEcuador. The Court need not engage in a determination of whether PetroEcuador can be estopped under the American federal law of estoppel from denying that it is bound to the JOA by its course of conduct because any reliance on a course of conduct in Ecuador would be unreasonable.

Therefore plaintiff's motion for summary judgment on defendant's counterclaims is GRANTED to the extent that it implicates arbitration in New York; the Court GRANTS plaintiff's request for a permanent injunction of the arbitration in New York; and the Court DENIES defendants' motion for summary judgment on the permanent injunction.

The Court recognizes that there remains the issue of the 1995 Settlement, which the Court did not dismiss in *ROE I*, after plaintiffs' stated that they would withdraw their claims if they were victorious on their initial arbitrability issue. *See ROE I*, 376 F.Supp.2d at 375. Recognizing this, the Court will grant the parties 60 days to evaluate their posture and confer with each other, at which point they are to advise the Court in a status letter what further proceedings, if any, they intend to pursue before this Court.

SO ORDERED

The REPUBLIC OF ECUADOR and Petroecuador, Plaintiffs,

v.

CHEVRONTEXACO CORPORATION and Texaco Petroleum Company, Defendants.

Chevrontexaco Corporation and Texaco Petroleum Company, Counterclaim Plaintiffs,

v.

The Republic of Ecuador and Petroecuador, Counterclaim Defendants.

No. 04 Civ. 8378(LBS).

United States District Court, S.D. New York.

June 27, 2005.

International Labor Rights Fund, Washington, DC, Terry Collingsworth, Thomas Cmar, Natacha Thys, Derek Baxter, Meredith Cohen Greenfogel & Skirnick, P.C., New York City, Robert A. Skirnick, Meredith Cohen Greenfogel & Skirnick, P.C., Philadelphia, PA, Daniel B. Allanoff, for Plaintiffs/Counterclaim Defendants the Republic of Ecuador and Petroecuador.

Jones Day, New York City, Thomas E. Lynch,

Jones Day, Washington, DC, Louis K. Fisher, Gregory A. Castanias, Michael Kolis, for Defendants/Counterclaim Plaintiffs ChevronTexaco Corporation and Texaco Petroleum Company.

OPINION AND ORDER

SAND, District Judge.

In this action, the Republic of Ecuador ("Ecuador" or "the Republic"), and its state-owned oil company Petroecuador, seek a permanent stay of an arbitration proceeding commenced by defendants ChevronTexaco Corporation ("ChevronTexaco") and Texaco Petroleum Company ("TexPet"), as well as other injunctive and declaratory relief. ChevronTexaco and TexPet (collectively "Defendants") counterclaim against Ecuador and Petroecuador (collectively "Plaintiffs"), alleging breach of contract and failure to indemnify an implied agent, and seeking damages as well as injunctive and declaratory relief.

The matter is currently before the Court on two motions by Plaintiffs: a motion for summary judgment on their own claims, and a motion to dismiss Defendants' counterclaims under Rule 12(b) for lack of subject matter jurisdiction and failure to state a claim. Also before the Court are various motions incidental to these two dispositive motions, such as applications to strike certain filings as untimely and for permission to file sur-replies. For the reasons stated below, Plaintiffs' motion for summary judgment is denied, and Plaintiffs' motion to dismiss the counterclaims is granted in part, denied in part, and in part left unresolved pending supplemental briefing regarding Ecuadorian law.

I. BACKGROUND

Because of the different legal standards governing the various motions before the Court, it is impossible to establish a single and complete set of facts that can be assumed to be true for purposes of this entire Opinion and Order. Before turning to the individual motions, however, it is useful to outline the basic facts regarding which the parties agree,[1] and the procedural history of this action, in order to place the motions and specific factual disputes in context.

A. The Napo Concession

In 1965, following a grant to them by Ecuador of an oil concession in the Oriente region of that country, known as the "Napo Concession," TexPet and the Ecuadorian Gulf Oil Company ("Gulf") entered into a Joint Operating Agreement (the "1965 JOA").[2] TexPet was named the first "Operator" under the 1965 JOA. The 1965 JOA contained an arbitration clause, requiring the parties to submit disputes to the American Arbitration Association ("the AAA") in New

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[1] The factual background in this section is drawn largely from the Local Rule 56.1 statement of undisputed material facts submitted by Plaintiffs in support of their motion for summary judgment, and Defendants' response thereto, as well as the allegations of Plaintiffs' Amended Complaint insofar as they are admitted in Defendants' Answer. In certain instances the contents of documents submitted in connection with the motions for summary judgment and to dismiss the counterclaims, the authenticity of which neither side has disputed, are also described.

[2] The concession was originally granted to companies related to, but not Identical to, those that possessed it in 1965. As no party appears to consider the distinction significant, it will not be pursued further.

York. It contained an indemnification clause providing as follows:

> If the Operator shall exercise its best judgment and care to select competent personnel and competent contractors to carry out and discharge its duties and obligations under this Agreement, the Operator shall not be liable to the Parties in damages or otherwise for its acts or omissions in carrying out and discharging or failing to carry out and discharge its duties and obligations under this Agreement. The Parties shall indemnify and save the Operator harmless from all claims and demands which may be made against Operator by third parties due to, arising out of, or related to the performance by the Operator of its duties under this Agreement.

(Perez Aff. Ex. C ¶ 6.4.) It also contained a choice-of-law clause stating that "[t]his Agreement and the relationship of the Parties hereunder shall be governed by and interpreted in accordance with the laws of the State of New York ... except for those matters which are necessarily governed by the laws of the Republic of Ecuador." (*Id.* ¶ 23.1.) The 1965 JOA provided that it would "inure to the benefit of and be binding upon the successors and assigns of the parties hereto and each of them respectively." (*Id.* ¶ 26.1.)

In February 1972, a military government took power in Ecuador. The military government wished to increase the Ecuadorian state's control over, and participation in, the development of Ecuador's oil reserves. In furtherance of this goal, on June 6, 1972, the government issued Supreme Decree No. 430, which, *inter alia*, required TexPet and Gulf "to agree

to new oil concession contracts with the Republic and to relinquish a substantial percentage of Napo Concession lands." (Pl. R. 56.1 Stmt. ¶ 52; Def. R. 56.1 Resp. ¶ 52.) The Ecuadorian state-owned oil company Compañia Estatal Petrolera Ecuatoriana or CEPE, which after reorganization later became plaintiff Petroecuador, immediately began to exploit those portions of the relinquished land where oil production was already ongoing. TexPet and Gulf requested compensation for the land they had relinquished, but these requests were rejected.

On or about March 27, 1973, Ecuador published Decree No. 317,[3] which established a Model Contract containing certain new terms to which TexPet and Gulf were required to agree. A modified version of this contract was published on or about August 4, 1973 in Decree No. 925, and signed by Ecuador, TexPet and Gulf on or about August 6, 1973.

The contract published in Decree No. 925 and signed on August 6, 1973 (the "1973 Contract") substituted for certain previous contracts; whether the 1965 JOA was among those contracts replaced by it is one of the main points of contention in this case. As had been mandated by Supreme Decree 430 in 1972, "the 1973 Contract incorporated the terms of a 1971 Hydrocarbons Law that gave the Republic greater control over oil pricing and a larger percentage of royalties." (Pl. R. 56.1 Stmt. ¶ 58; Def. R. 56.1 Resp. ¶ 58.) The 1973 Contract also mandated

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[3] Plaintiffs' Local Rule 56.1 statements of undisputed facts vary with respect to whether the various decrees of the Ecuadorian government are described as "Decree No. ___" or "Supreme Decree No. ___." In the absence of any suggestion that the distinction matters, the Court follows Plaintiffs' usage.

that CEPE be allowed an option to purchase a stake in the Napo Concession, or Napo Consortium (as Plaintiffs describe the organization formed to explore the Napo Concession), in 1977. The 1973 Contract did not contain an arbitration clause.

On or about January 10, 1974, Ecuador issued Supreme Decree No. 9, mandating that CEPE would begin participating in the Napo Concession or Consortium in 1974, rather than in 1977 as had been indicated by the 1973 Contract. In ensuing negotiations, "the Republic informed Texaco[4] and Gulf that CEPE's 25% participation in the Napo Consortium would begin on June 6, 1974, whether or not the Republic and the companies had reached an agreement on compensation." (Pl. R. 56.1 Stmt. ¶ 63; Def. R. 56.1 Resp. ¶ 63.) Given this ultimatum and fearing complete expropriation of the Napo Consortium by the Republic if it did not comply, TexPet executed a contract or "Acta" on or about June 14, 1974 (the "1974 Contract").[5] The other signatories to the compelled 1974 Contract were Gulf, CEPE, and the Republic; Plaintiffs assert that the

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[4] Plaintiffs often refer to ChevronTexaco and TexPet collectively as "Texaco," see Am. Compl. ¶ 1, and with respect to certain portions of Plaintiffs' Local Rule 56.1 statement where the distinction makes little or no substantive difference, Defendants have admitted the truth of statements that refer to Texaco collectively when a reference to TexPet might have been more appropriate.

[5] Defendants object to Plaintiffs' characterization of the 1974 Contract as a "purchase agreement," on the ground that the June 14, 1974 "Acta" was "a government edict" rather than an agreement involving "some semblance of negotiation." (Def. R. 56.1 Resp. ¶ 22.)

Republic and CEPE were "acting jointly as one party" (Pl. R. 56.1 Stmt. ¶ 68), but Defendants deny this.

Under the 1974 Contract, CEPE acquired a 25% share of all of the Napo Concession's operations, including "proportional parts of all investments, operational costs, obligations, royalties, [and] sales of crude for internal consumption...." (Pl. R. 56.1 Stmt ¶ 23, quoting Pls.' Ex. Q. cl. 10; Def. R. 56.1 Resp. ¶ 23.) The 1974 Contract also provided for acquisition of a share of the Trans-Ecuadorian Pipeline by either CEPE or the Republic of Ecuador, but this provision was unilaterally voided by the Republic in 1975. The 1974 Contract did not itself contain a clause providing for arbitration; it did, however, contain a clause stating that "[t]he totality of the activities that will develop in the Joint Operation will be regulated by an operating agreement entered into by the parties"[6] (Pl. R. 56.1 Stmt. ¶ 24, quoting Pls.' Ex. Q. cl. 8; Def. R. 56.1 Resp. ¶ 24), the effect of which the parties dispute.

By 1976, Gulf became uncomfortable with its position with respect to the Republic, and began to withhold certain funds from the Republic. The Republic responded by threatening expropriation of Gulf's Napo Consortium assets. Fearing that it would lose its stake in the Consortium without receiving any compensation, Gulf negotiated an agreement, finalized on May 27, 1977, by which Gulf's remaining 37.5% stake in the Consortium was transferred to

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[6] The 1974 Contract, like most of the documents other than the 1965 JOA that are at issue in this case, was originally written in Spanish rather than English. This quotation is from the English translation, as are many of the other quotations in this Opinion and Order.

CEPE (which Plaintiffs assert was again acting as one party with the Republic). This agreement (the "1977 Contract") contained clauses addressing CEPE's lack of obligation for certain claims of or against Gulf, the effect of which the parties again dispute.

From 1977 to 1990, the Napo Concession or Consortium continued to operate with TexPet and CEPE/Petroecuador as the only partners and TexPet as the Operator. On January 22, 1985, however, TexPet and CEPE entered into an agreement providing for CEPE to take over as Operator on one year's notice (the "1985 Agreement").

On July 1, 1990, pursuant to an agreement signed by representatives of Petroecuador and TexPet the previous day (the "1990 Agreement"), Petroamazonas, a subsidiary of Petroecuador, replaced TexPet as the Operator of the Napo Concession. On March 25, 1991, Petroecuador, TexPet, and Petroamazonas entered into an "Operating Agreement" for the "Petroecuador-Texaco Consortium" (the "1991 Agreement"), which agreement specified that it would "be effective [retroactively] as of the first day of July 1990 and remain in effect until the termination of the [1973] Contract." (Supplementary Kolis Decl. Ex. 1.) The expiration date of the Napo Concession as provided in the 1973 Contract was June 6, 1992.

B. *Aguinda v. Texaco*, the 1995 Settlement, and the Lago Agrio Action

In 1993, an action captioned *Aguinda v. Texaco* was brought in the United States District Court for the Southern District of New York by a group of residents of the Oriente region of Ecuador (the

"Aguinda Plaintiffs"), against Texaco, Inc., which has since become a wholly owned subsidiary of defendant ChevronTexaco by merger. The Aguinda Plaintiffs "alleged that between 1964 and 1992 Texaco's oil operation activities polluted the rain forests and rivers in Ecuador...." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir.2002). They "sought money damages under theories of negligence, public and private nuisance, strict liability, medical monitoring, trespass, civil conspiracy, and violations of the Alien Tort Claims Act," as well as

> extensive equitable relief to redress contamination of the water supplies and environment, including: financing for environmental cleanup to create access to potable water and hunting and fishing grounds; renovating or closing the Trans-Ecuadorian Pipeline; creation of an environmental monitoring fund; establishing standards to govern future Texaco oil development; creation of a medical monitoring fund; an injunction restraining Texaco from entering into activities that risk environmental or human injuries, and restitution.

Id. at 473-474.

The procedural history of the *Aguinda* litigation is outlined in detail in *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir.2002), and *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir.1998). Although it would be duplicative to recite that entire history here, a brief summary is appropriate. In November 1996, on Texaco's motion, the case was dismissed by the district court (Rakoff, *J.*) on grounds of forum non conveniens, international comity, and failure to join indispensable parties, specifically Ecuador and Petroecuador, whose presence was held to be necessary to effectuate the

extensive equitable relief requested, but impossible to obtain in light of their sovereign immunity. *Aquinda*[7] *v. Texaco, Inc.*, 945 F.Supp. 625 (S.D.N.Y.1996). The Second Circuit in 1998 vacated the dismissal and remanded the case for reconsideration, *Jota*, 157 F.3d at 163, holding that a forum non conveniens dismissal was inappropriate absent a requirement that Texaco consent to Ecuadorian jurisdiction, *id.* at 159; that the comity determination had potentially been undermined by Ecuador's change from opposing litigation of the issue in a United States court to supporting that litigation, *id.* at 160-161; and that the indispensable-party theory, while perhaps correct as to some of the relief requested, was insufficient to support dismissal of the entire complaint, *id.* at 162. On remand, Texaco having consented to jurisdiction in Ecuador, the district court again dismissed the case on grounds of forum non conveniens. *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y.2001). The Second Circuit affirmed. *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir.2002).

During the pendency of the *Aguinda* litigation, TexPet, Ecuador and Petroecuador entered into several agreements regarding environmental remediation. Following a December 1994 Memorandum of Understanding, those parties in May 1995 signed a contract the name of which has been translated as "Contract For Implementing Of Environmental Remedial Work and Release From Obligations, Liability and Claims" (hereinafter referred to as the "1995 Settlement"). In the 1995 Settlement, TexPet agreed to perform specified

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[7] "The caption of this order incorrectly spells the plaintiffs' name 'Aquinda,' instead of 'Aguinda.' " *Jota*, 157 F.3d at 157 n.5.

environmental remedial work in exchange for a release of claims by the Government of Ecuador and Petroecuador. This release, granted to TexPet, Texaco, Inc., and other related companies, encompassed by its terms "all the Government's and Petroecuador's claims against the Releasees for Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted" under the 1995 Settlement itself, which were to be "released as the Environmental Remedial Work is performed to the satisfaction of the Government and Petroecuador." (Veiga Aff. Ex. B at 9.) By a "Final Document" dated September 30, 1998 (the "1998 Final Release"), the 1995 Settlement was declared to be "fully performed and concluded," and the Government and Petroecuador "proceed[ed] to release, absolve, and discharge" TexPet and related companies "from any liability and claims by the Government of the Republic of Ecuador, PETROECUADOR and its Affiliates, for items related to the obligations assumed by TEXPET in" the 1995 Settlement. (Veiga Aff. Ex. D at Part IV.)

In May 2003, following the final dismissal of the *Aguinda* litigation, a group of individuals that Plaintiffs allege included "a substantial number of the Aguinda Plaintiffs" filed claims against Chevron-Texaco in Lago Agrio, Ecuador. One of the laws upon which the plaintiffs in this Lago Agrio litigation based their claims, although not the only law, was an Ecuadorian environmental law enacted in 1999. Defendants contend that this law in effect allows the plaintiffs in the Lago Agrio litigation to assert, as private attorneys general, claims that belonged to

Ecuador but were released by the 1995 Settlement and 1998 Final Release.

C. Procedural History of This Litigation

On June 11, 2004, ChevronTexaco and TexPet commenced an arbitration proceeding against Petroecuador before the AAA, claiming a right to indemnification for their costs and expenses in connection with the Lago Agrio litigation. They sought a monetary award for breach of contract, specifically breach of the 1965 JOA, which they alleged "require[d] Petroecuador to indemnify Chevron Texaco and TexPet for Petroecuador's share of all claims arising out of TexPet's role as Operator of the Napo Concession." (Kolis Decl. Additional Docs. Ex. 1 ¶ 54.) This award was to be in the amount of "the total value of their costs, fees, and any adverse judgment rendered in the Lago Agrio lawsuit, plus interest." (*Id.* ¶ 59.) ChevronTexaco and TexPet further sought "injunctive relief requiring Petroecuador to pay all fees, costs, and expenses associated with the Lago Agrio litigation that may be incurred in the future, including the amount of any potential adverse final judgment rendered against ChevronTexaco in the Lago Agrio litigation." (*Id.* ¶ 62.) TexPet, although purportedly not ChevronTexaco, further sought "a declaratory judgment that the [1965] JOA's indemnity provision is valid and binding, and that Petroecuador is responsible to indemnify and hold harmless TexPet and ChevronTexaco ... for ... all fees, costs and expenses relating to the Ecuadorian lawsuit, including any final judgment that may be rendered against ChevronTexaco in Ecuador." (*Id.* ¶ 66.)

On October 15, 2004, Plaintiffs commenced an action in New York State Supreme Court, New York County, against Defendants and the AAA, seeking an order and judgment staying the arbitration proceeding that had been brought by Defendants against Petroecuador. Proceeding by petition under section 7503 of the New York Civil Practice Law and Rules (CPLR) and "the exception to CPLR § 7503(c) that was established by the New York Court of Appeals in *Matarasso v. Continental Casualty Company*, 56 N.Y.2d 264, 451 N.Y.S.2d 703, 436 N.E.2d 1305 (1982)," they asserted as the basis for their petition that "the Petitioners never agreed to arbitrate." (Notice of Removal Ex. 3 ¶ 25.) Defendants removed the action to this Court by notice of removal filed on October 22, 2004.

Following removal, Defendants ChevronTexaco and TexPet responded to the petition by filing first a Memorandum of Law in Opposition to Motion for Preliminary Injunction (Defendants having interpreted Plaintiffs' actions in state court as a request for such a preliminary injunction), and then an Answer. The AAA responded by filing a motion to dismiss the petition pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In a Memorandum and Order dated December 7, 2004, this Court granted the AAA's motion and dismissed the action insofar as it named the AAA as a party defendant, finding the AAA to be neither a necessary or proper party under the well-established legal principle of arbitral immunity.

Plaintiffs then moved for leave to amend their complaint, *see* Fed. R. Civ. Pro. 15(a), and leave to file an amended complaint was granted without

opposition. Plaintiffs' Amended Complaint, filed on December 8, 2004, restates their demand for a permanent stay of arbitration proceedings, and asserts several additional claims for relief as well. At oral argument, Plaintiffs' counsel represented that these additional claims are contingent, such that the Court need address them only if it concludes that the arbitration should not be dismissed; the Amended Complaint, however, does not explicitly make the additional claims contingent upon failure of the arbitration claim.

The additional claims for relief all focus on alleged inconsistencies between positions purportedly taken by Defendants in demanding arbitration and positions taken by Texaco during the *Aguinda* litigation. First, Plaintiffs claim that collateral estoppel precludes re-litigation of the issue of "the Republic of Ecuador and Petroecuador's sovereign immunity in this matter," because this issue "was actually litigated and determined in the District Court's 1996 *Aguinda v. Texaco* decision" and "[t]he District Court's 1996 holding that the Republic of Ecuador and Petroecuador enjoyed sovereign immunity in the United States was essential to the District Court's ultimate dismissal of the case under the doctrine of *forum non conveniens* and the affirmance of that decision by the Second Circuit." (Am.Compl.¶¶ 64-67.) Second, Plaintiffs claim that the doctrine of judicial estoppel prevents Defendants from asserting that Petroecuador agreed to arbitration, because this assertion is inconsistent with the position taken by Texaco in the *Aguinda* litigation regarding the sovereign immunity of Ecuador and Petroecuador. Third, Plaintiffs claim that Texaco's failure to seek arbitration against

Petroecuador during the pendency of the *Aguinda* litigation constituted a waiver of the right to arbitrate.

The prayer for relief in Plaintiffs' Amended Complaint[8] requests both "a permanent and final injunction, staying the arbitration proceedings ... before the AAA" (Am. Compl. Prayer for Relief ¶ (C)), and other injunctive and declaratory relief with respect to various aspects of Plaintiffs' claims. Plaintiffs request a ten-part declaratory judgment, the substance of which can be understood as comprising six parts: (1) that their collateral estoppel, judicial estoppel, and waiver theories are meritorious; (2) that "[n]either ... Ecuador nor Petroecuador has ever agreed to arbitrate any disputes with Texaco[9] in any American forum" and "there are no valid grounds upon which Texaco may demand arbitration against ... Ecuador or Petroecuador" (*id.* ¶¶ (A)(i)-(A)(j)); (3) that the 1973 Contract and not the 1965 JOA controls the contractual relationship between Plaintiffs and Defendants; (4) that Plaintiffs are "a single party for the purposes of their contractual relationship with Texaco"(*id.* ¶ (A)(f)); (5) that neither Ecuador nor Petroecuador has waived sovereign immunity in the

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[8] Perhaps because of a typographical error, the Prayer for Relief in Plaintiffs' Amended Complaint states not that Plaintiffs request the relief described, but rather that "the Aguinda Plaintiffs" request such relief. Neither party has suggested, in the briefing on any of the motions currently before the Court, that this error should have substantive consequences.

[9] When Plaintiffs use the term "Texaco," they generally refer not to Texaco, Inc., but to "Defendants ChevronTexaco Corporation and Texaco Petroleum Company (collectively 'Texaco')," as they describe the parties from whom they seek relief. (Compl.¶ 1.)

United States in this matter; and (6) that "*Aguinda v. Texaco* involved the same claims, brought by many of the same plaintiffs, as the case currently pending in Lago Agrio, Ecuador on which Texaco seeks indemnification from Petroecuador in this matter" (*id.* ¶ (A)(c)). Plaintiffs further request that the Court "[i]ssue ... permanent and final injunction[s], estopping Texaco from denying that the Republic of Ecuador and Petroecuador enjoy sovereign immunity in the United States in this matter .... [and] barring Texaco from asserting a right to indemnification against the Republic of Ecuador and Petroecuador in this matter." (*Id.* ¶ (B)-(C).)

In response to this Amended Complaint, Defendants, on January 10, 2005, filed an Answer containing several counterclaims. The counterclaims brought against Petroecuador are explicitly conditional, in the sense that Defendants commit not to litigate them in this Court unless "the arbitrability question raised by the Amended Complaint is decided in favor of Petroecuador." (Countercls.¶ 5.) The counterclaims against the Republic of Ecuador are not conditional.

The first counterclaim, asserted against Petroecuador only, is for "indemnification of [an] implied agent." (Countercls.¶¶ 65-70.) Petroecuador, Defendants allege, is bound to indemnify ChevronTexaco and TexPet for their costs and expenses in the Lago Agrio litigation, and any final judgment therein, because after Petroecuador's entry into the Napo Consortium "TexPet ... operated the Consortium as Petroecuador's agent" and "[t]he litigation expenses and costs of any judgment in the Lago Agrio litigation have been and will be incurred

within the scope of the agency relationship." (Countercls.¶¶ 66-67.)

The second and third counterclaims are asserted against both Ecuador and Petroecuador, and concern alleged breaches of the 1995 Settlement and 1998 Final Release. Specifically, Ecuador and Petroecuador are said to have breached those agreements by "allowing the Lago Agrio lawsuit to proceed as a private-attorney-general action," by "refusing to inform the court in Lago Agrio that they owned and released all rights to environmental remediation or restoration by TexPet in the concession area," and by not "indemnifying ChevronTexaco and TexPet for any of their costs" in the Lago Agrio litigation. (Countercls.¶ 75.) Defendants seek damages for costs that they have incurred in the Lago Agrio litigation or that they will incur in the future, and an injunction "requiring the Republic of Ecuador and Petroecuador to pay all fees, costs and expenses associated with the Lago Agrio litigation that may be incurred in the future, including the amount of any potential adverse final judgment rendered against ChevronTexaco in the Lago Agrio litigation" (Countercls.¶ 81).

In Defendants' fourth counterclaim, they seek a declaratory judgment addressing the same subject matter as the first three counterclaims. The judgment that they request would declare

> that Petroecuador is in breach of its obligations to indemnify TexPet for Consortium operations, that the Republic of Ecuador and Petroecuador are in breach of their obligations under the 1995 Settlement and 1998 Final Release ... and that the Republic of Ecuador and Petroecuador are

> obligated to intervene in the Lago Agrio litigation and inform the Ecuadorian court that they owned and released all rights to environmental remediation or restoration by TexPet in the concession area, and to indemnify and hold harmless TexPet and ChevronTexaco for any and all fees, costs and expenses relating to the Ecuadorian lawsuit, including any final judgment that may be rendered against ChevronTexaco in Ecuador.

(Countercls.¶ 84.) That is, the judgment requested by Defendants would declare the correctness of Defendants' positions with respect to both the implied-agency claim against Petroecuador and the settlement-based claims against Ecuador and Petroecuador.

Plaintiffs responded to the counterclaims, as has already been mentioned, not by answer but by motion to dismiss pursuant to Rule 12(b), asserting both lack of subject-matter jurisdiction and failure to state a claim. Shortly after filing this motion on January 31, 2005, they filed, on February 7, the motion for summary judgment that is now before the Court. On February 28, Plaintiffs filed an additional motion to stay discovery pending resolution of the two dispositive motions. Defendants also having filed their responses to the two dispositive motions on February 28, Plaintiffs then filed, on March 1, a motion to strike Defendants' responses as untimely, or, in the alternative, for a preliminary injunction and additional time to reply. Following a telephone conference on March 2, the Court ordered all proceedings in the arbitration stayed until the pending motions for permanent stay of arbitration

proceedings were decided or until further order of this Court. The subsequent briefing on both dispositive motions led to a motion by Defendants for permission to file sur-replies in opposition, in response to which Plaintiffs moved for permission to file a response to the sur-replies. Oral argument was then held, and the Court reserved decision.

II. JURISDICTION AND VENUE

A. Subject Matter Jurisdiction Over Plaintiffs' Claims

Although no party has disputed that this Court has subject-matter jurisdiction over plaintiffs' claims, the Court must nevertheless determine whether such jurisdiction exists. *Da Silva v. Kinsho Int'l Corp.*, 229 F.3d 358, 361 (2d Cir.2000). Plaintiffs have alleged two sources of federal subject-matter jurisdiction for the claims contained in their Amended Complaint: diversity jurisdiction under 28 U.S.C. § 1332, and federal-question jurisdiction pursuant to 28 U.S.C. § 1331 and 9 U.S.C. §§ 201-08, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Defendants initially removed the action pursuant to the same claimed sources of jurisdiction, as well as two others: federal-question jurisdiction pursuant to the Inter-American Convention on International Commercial Arbitration, specifically 9 U.S.C. § 302, and general federal-question jurisdiction due to the applicability of the federal substantive law of arbitration. Because the source of the Court's jurisdiction may determine the appropriate choice of governing law, *see Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir.1999), and Part III.B.1.a

infra, it is prudent to examine all of the potential sources.

1. Diversity Jurisdiction

The Court has diversity jurisdiction over the subject matter of Plaintiffs' claims pursuant to 28 U.S.C. § 1332(a)(4), which allows such jurisdiction "where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between ... a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a state or different states." 28 U.S.C.A. § 1332(a) (West 2005). Plaintiffs and Defendants agree that the amount in controversy exceeds the value of $75,000 (Not. of Removal ¶ 2(e); Am. Compl. ¶ 14; Ans. ¶ 14), and this appears to be so. Defendants, both corporations incorporated in Delaware and with principal places of business in California, are "citizens of a state or of different States" for diversity purposes. And whatever the outcome of the dispute between Plaintiffs and Defendants regarding whether Petroecuador is legally distinct from the Republic, the foreign-state-as-plaintiff condition of § 1332(a)(4) jurisdiction is also met.

Plaintiffs are foreign states as that term is defined in 28 U.S.C. § 1603(a), whether or not Petroecuador has a legal Identity independent from the Republic. Ecuador is a foreign state in the simplest meaning of that term. On Plaintiffs' view, Petroecuador is a kind of doing-business-as name for Ecuador. On Defendants' view, Petroecuador is "a separate legal person ... a majority of whose ... ownership interest is owned by a foreign state ... and ... which is neither a citizen of a State of the United States ... nor created under the laws of any third country," 28 U.S.C.A. §

1603(b), and thus is "an agency or instrumentality of a foreign state as that term is defined in [28 U.S.C. § 1603](b)," 28 U.S.C.A. § 1603(a). In either case, Petroecuador, like the Republic of Ecuador, is covered by § 1332(a)(4).

Furthermore, while § 1332(a)(4) only speaks of an action in which "a foreign state" is plaintiff, not an action in which two foreign states are plaintiffs, it would nevertheless apply even if Petroecuador were considered to be a legal entity distinct from the Republic. The Second Circuit's statement that in the § 1603(a) context "agencies and instrumentalities ... are subsumed within the 'foreign state' .... [and] deemed *part of* the foreign state," *Filler v. Hanvit Bank*, 378 F.3d 213, 219 (2d Cir.2004) (emphasis in original), strongly suggests that Petroecuador would be deemed part of the single "foreign state" of Ecuador for purposes of § 1332(a)(4) despite any independent legal identity it might have. Even assuming *arguendo* that Petroecuador did qualify as a § 1603(a) "foreign state" separate from Ecuador, § 1332(a)(4) would still apply because of the rule that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise ... words importing the singular include and apply to several persons, parties, or things." 1 USCS § 1 (2005). There is no apparent contextual reason why a suit should not be subject to diversity jurisdiction simply because it is brought by both a foreign state and an instrumentality of that same foreign state.[10] Thus, all

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[10] The constitutional grant of alienage jurisdiction extends to "Controversies ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," U.S. Const. Art. III. § 2, so it is certainly constitutionally permissible to follow 1 USC § 1 and construe § 1332(a)(4) as extending to suits brought by two

of the conditions for § 1332(a)(4) jurisdiction are satisfied here.

2. Federal-Question Jurisdiction

The Court would have federal-question jurisdiction over the subject matter of this action if the action were governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 ("the New York Convention")[11], 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted at 9 U.S.C.A. § 201 note (West 2004), or the Inter-American Convention on International Commercial Arbitration of January 30, 1975 ("the Inter-American Convention"), O.A.S.T.S. No. 42, reprinted at 9 U.S.C.A. § 301 note. Chapter Two of the Federal Arbitration Act (FAA), implementing the New York Convention, provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States ... [and][t]he district courts of the United States ... shall have original jurisdiction over such action or proceeding, regardless

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or more "foreign States [or] Citizens." The inclusion of suits brought by foreign states or foreign citizens in the constitutional grant of jurisdiction also renders it immaterial whether one considers an instrumentality of a foreign state, such as Petroecuador is according to Defendants' view, to be more aptly described in a constitutional sense as a foreign state or as a citizen of that foreign state.

[11] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 is often referred to as the "New York Convention" because it was drafted, enacted, and opened for signature in New York City. *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 18 (2d Cir.1997); *Spier v. Calzaturificio Tecnica, S.p.A.*, 663 F.Supp. 871, 872 n. 1 (S.D.N.Y.1987).

of the amount in controversy," 9 U.S.C.A. § 203, and also provides for removal to federal court "[w]here the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention," 9 U.S.C.A. § 205. Chapter Three of the FAA, implementing the Inter-American Convention, makes the original-jurisdiction and removal provisions of Chapter Two applicable to that Convention as well. 9 U.S.C.A. § 302 (stating that 9 U.S.C. §§ 202-205, and § 207, "shall apply to this chapter as if specifically set forth herein, except that for purposes of this chapter 'the Convention' shall mean the Inter-American Convention").

Defendants' suggestion that the mere applicability of the federal substantive law of arbitration would be sufficient to provide federal-question jurisdiction under 28 U.S.C. § 1331 is incorrect, however. The original FAA, now Chapter One of that statute, "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet ... does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331... or otherwise." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Thus, whether federal-question jurisdiction exists depends upon whether either the New York Convention or the Inter-American Convention (collectively "the Conventions") applies.

As a general matter, the Conventions are enforceable in United States courts where, as here, a written agreement purportedly exists that provides for arbitration in the United States (or another

signatory nation), and the legal relationship out of which the alleged arbitration agreement arises is a commercial one with a significant connection to a foreign country. *See* 9 U.S.C.A. §§ 201-202, 301-302; *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir.1999); *Productos Mercantiles E Industriales, S.A. v. Faberge USA*, 23 F.3d 41, 44-45 (2d Cir.1994). It is immaterial that the alleged arbitration agreement, comprised of the 1965 JOA and Petroecuador's purported accession thereto in the early 1970s, partially predates the New York Convention (which entered into force in the United States in 1970, *see* 9 U.S.C.A. § 201 note), and completely predates the Inter-American Convention (which began its existence in 1975 and did not enter into force in the United States until 1990, *see* 9 U.S.C.A. § 301 note). The Second Circuit has observed with respect to the New York Convention that "the Convention contains no prospective language and should be applied retroactively to existing arbitration agreements and awards." *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 515 n. 3 (2d Cir.1975). The Inter-American Convention contains no "prospective language" not present in the New York Convention, and the Second Circuit has stated that "[t]he legislative history of the Inter-American Convention's implementing statute ... clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention," *Productos Mercantiles*, 23 F.3d at 45.[12] Thus,

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[12] *Productos Mercantiles* quotes the House Report on the Inter-American Convention as stating that

> The New York Convention and the Inter-American Convention are intended to achieve the same results, and

Fotochrome's retroactivity holding should apply to the Inter-American Convention as well. The fact that "the United States acceded to the Convention [s] after the contract in suit was signed," *Fotochrome*, 517 F.2d at 515 n. 3, therefore does not alter the general applicability of either of the Conventions to the legal relationship at issue here.

The more difficult question is whether either or both of the Conventions are applicable to provide jurisdiction over this particular action. Article II of the New York Convention provides for recognition of an "agreement in writing" to submit to arbitration, and further provides that a court having before it "an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless the said agreement is null and void, inoperative or incapable of being performed." 9 U.S.C.A. § 201 note (West 2004). In this action, however, Plaintiffs do not

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> their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee's expectation, in view of that fact and the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, that courts in the United States would achieve a general uniformity of results under the two conventions.

23 F.3d at 45 (quoting H.R.Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678). The President's transmittal message also described the Inter-American Convention as "similar in purpose and effect to the New York Convention." *Id.* (quoting President's Message to the Senate Transmitting the Inter-American Convention on Commercial Arbitration, 1981 Pub. Papers 517 (June 15, 1981)).

request the Court to refer the parties to arbitration, but rather ask the Court to *prevent* arbitration, and to grant them other injunctive and declaratory relief as well. It is not at all clear that an action seeking such relief "fall[s] under the [New York] Convention" within the meaning of 9 U.S.C. § 203, so as to provide this Court with original jurisdiction. The Inter-American Convention says still less about judicial intervention before the stage at which an arbitration award exists, stating only that "[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid," 9 U.S.C.A § 301 note,[13] so it would seem if anything less likely to provide jurisdiction (under § 203 as incorporated by § 302) for a petition to stay arbitration. That the implementing law for both the New York Convention and the Inter-American Convention incorporates chapter one of the FAA to the extent it is not inconsistent with them, 9 U.S.C.A. §§ 208, 307, does not change this result, as "the FAA does not provide for petitions (such as [Plaintiffs']) brought by the party seeking to stay arbitration." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir.2003).

The Second Circuit has suggested that "the [New York] Convention [is] inapplicable ... [where] the party invoking its provisions did not seek either to compel arbitration or to enforce an arbitral award." *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n. 5 (2d Cir.1989). This

[13] Unlike the New York Convention, the Inter-American Convention contains no specific instruction that a court should refer parties to arbitration when seized of an action involving such an agreement.

suggestion would preclude invocation of the New York Convention-and presumably the Inter-American Convention as well, *see Productos Mercantiles*, 23 F.3d at 45-by a party simply seeking to stay arbitration, let alone one also seeking to obtain broader declaratory and injunctive relief. In *Borden v. Meiji Milk Products Co.*, 919 F.2d 822, 826 (2d Cir.1990), the Second Circuit expanded the category of parties allowed to invoke the New York Convention somewhat when it "h[e]ld that entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to [the Convention]." This holding, however, was coupled with an emphasis on the fact that "far from trying to bypass arbitration, Borden sought to have the court *compel* arbitration." 919 F.2d at 826. There appears to be little or no basis in Second Circuit case law for invocation of the New York Convention or the Inter-American Convention by a party seeking to *avoid* arbitration, rather than compel or aid it.

In this case, however, the parties who initially sought the exercise of federal jurisdiction were Defendants, under the removal provision applicable to the Conventions. That provision, 9 U.S.C. § 205 (made applicable to the Inter-American Convention by 9 U.S.C. § 302), allows removal "[w]here the subject matter of an action or proceeding pending in state court relates to an arbitration agreement or award falling under the Convention," whether or not this relationship "appear[s] on the face of the complaint." 9 U.S.C.A. § 205. The logic of *Borden* suggests that this aspect of Convention jurisdiction was available to Defendants: they were seeking to allow arbitration to continue, while Plaintiffs were

the ones who sought to "bypass" it by their application for a stay of arbitration pursuant to Article 75 of the CPLR.

The fact that Plaintiffs dispute the existence of any "arbitration agreement" between the parties is irrelevant to the question of subject matter jurisdiction under the Conventions. In *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir.2005), the Second Circuit rejected the argument that "the district court lacked subject matter jurisdiction in the absence of a signed written arbitration agreement between the parties," where the dispute before the court concerned whether respondent Oracle Corp. was legally bound to arbitrate by a contract entered into between petitioner Sarhank and a *subsidiary* of Oracle. According to *Sarhank*, "[w]hen a party challenges the court's subject matter jurisdiction based upon the merits of the case," such as by disputing whether it is bound by an arbitration agreement it did not itself sign, "that party is merely arguing that the adversary has failed to state a claim ... [and][t]he court has and must assume subject matter jurisdiction and hear the merits of the case." 404 F.3d at 660. Thus, this Court had federal-question removal jurisdiction, pursuant to 9 U.S.C. § 205, over Plaintiffs' application to stay the arbitration.

Plaintiffs' decision to file an amended complaint after removal should not alter the jurisdictional situation with regard to their application for a stay of arbitration. The amended complaint still contains the same application for a stay under Article 75 of the CPLR (specifically CPLR § 7503), a New York procedural rule that the Court is requested to

"borrow" as an alternative to issuing a stay under the FAA and the All Writs Act. (Am.Compl.¶ 13.) That Plaintiffs have chosen to add other claims for relief and other proposed sources of jurisdiction, *in addition* to what was present in the removed action, should not operate to deprive the Court of any federal-question jurisdiction it had upon removal. This is so both as a matter of logic,[14] and because it would be incompatible with the basic purpose of a removal provision for the addition of other claims to deprive Defendants of any protection granted them by the existence of federal-question jurisdiction under 9 U.S.C. § 205.

With respect to Plaintiffs' requests for broader injunctive and declaratory relief pertaining to their waiver and estoppel theories, however, federal-question jurisdiction is lacking. Those claims for relief were not part of the removed action, do not fall within 9 U.S.C. § 203 as interpreted in *International Shipping* and *Borden*, and do not raise a jurisdiction-bestowing federal question in any other respect. The Court's jurisdiction over those claims for relief must therefore stem solely from 28 U.S.C. § 1332, or perhaps from 28 U.S.C. § 1367(a) (supplemental jurisdiction). This implies that New York choice of law rules apply to those claims. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir.1989).

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[14] An analogous addition of state claims to a complaint that had originally stated only a federal question would not deprive the Court of federal-question jurisdiction; the only issue would be whether to exercise supplemental jurisdiction over the state claims pursuant to 28 U.S.C. § 1367.

B. Subject Matter Jurisdiction Over Defendants' Counterclaims

Unlike the existence of subject-matter jurisdiction over Plaintiffs' claims, the existence of subject-matter jurisdiction over Defendants' counterclaims is vehemently contested: Plaintiffs have moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Defendants' counterclaims for, *inter alia*, lack of such jurisdiction. Because the issue has been raised by a distinct motion so briefed by the parties, and because deferring consideration of it is more analytically appropriate in other respects, the question of jurisdiction over the counterclaims will be addressed in a subsequent portion of this Opinion and Order. *See infra* Part IV.A.

C. Personal Jurisdiction and Venue

Defendants do not dispute the existence of personal jurisdiction, any objection with respect to which is therefore waived. Defendants also do not dispute the appropriateness of venue in the Southern District of New York, any objection to which is also waived. Plaintiffs, too, do not raise, and therefore waive, any objection as to personal jurisdiction or venue with respect to Defendants' counterclaims.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

The standard under which Rule 56 motions for summary judgment are evaluated is a familiar one. "Summary judgment is appropriate only where ... the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Carroll v. United*

States, 339 F.3d 61, 67 (2d Cir.2003); Steel Partners II, L.P. v. Bell Indus., Inc., 315 F.3d 120, 123 (2d Cir.2002) (internal quotations omitted). "In assessing the record, all ambiguities and reasonable inferences are viewed in a light most favorable to the nonmoving party." *Vona v. County of Niagara*, 119 F.3d 201, 206 (2d Cir.1997). "The party seeking summary judgment has the burden to demonstrate that no genuine issue of material fact exists." *Marvel Characters v. Simon*, 310 F.3d 280, 286 (2d Cir.2002).

While "[t]he mere existence of a scintilla of evidence in support of the [nonmovants'] position will be insufficient" to defeat a motion for summary judgment, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), "[s]ummary judgment is improper if there is any evidence in the record that could reasonably support a .... verdict for the non-moving party," *Marvel Characters*, 310 F.3d at 286. "On a motion for summary judgment, the court is not to weigh the evidence, or assess the credibility of the witnesses, or resolve issues of fact, but only to determine whether there are issues to be tried." *United States v. Rem*, 38 F.3d 634, 644 (2d Cir.1994).

B. Analysis

Plaintiffs raise three distinct arguments in support of their contention that no genuine issue of material fact precludes the determination that Defendants' dispute with Petroecuador is not arbitrable. Their primary argument is that Petroecuador never agreed to arbitrate disputes such as the one at issue. Plaintiffs also assert that the doctrine of waiver, and the act of state doctrine as applied to the 1973 Contract, provide independent grounds on which to

find that Defendants are barred from seeking arbitration against Petroecuador, even if an otherwise-valid arbitration agreement exists.

1. **Agreement to Arbitrate**

"In considering whether 'a particular dispute is arbitrable,' a court must first decide 'whether the parties agreed to arbitrate.' " *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir.1999) (quoting *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 294 (2d Cir.1999)). The Second Circuit "ha[s] held that whether an entity is a party to the arbitration agreement also is included within the broader issue of whether the parties agreed to arbitrate." *Id.* At issue here is whether Petroecuador is, or was, a party to an arbitration agreement covering the dispute in question.

It is common ground between the parties that Petroecuador "never signed an arbitration agreement with [either defendant], the customary implementation of an agreement to arbitrate," *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 662 (2d Cir.2005). Defendants contend, however, that Petroecuador became a party to the 1965 JOA, which contained an arbitration clause, when Petroecuador acquired its stake in the Napo Consortium. As they explain it, the 1973 Contract that accompanied Petroecuador's entry into the Consortium replaced the 1964 concession agreement between Ecuador and the concessionaires, but did not affect the 1965 JOA, which continued to govern relations among the members of the Consortium (one of which, after 1973, was Petroecuador). Even though Petroecuador did not sign the 1965 JOA, Defendants assert, it

knowingly accepted benefits from the 1965 JOA and proceeded as if the 1965 JOA controlled its relationship with TexPet. Thus, Defendants conclude, Petroecuador is bound by the arbitration clause within the 1965 JOA.

Plaintiffs, in contrast, assert that the 1973 Contract was a novation that replaced the 1965 JOA, and that the 1973, 1974 and 1977 Contracts-none of which contain an arbitration clause-governed Petroecuador's relationship with the other members of the Napo Consortium. According to Plaintiffs, the notion that the 1965 JOA and the arbitration clause within it apply to Petroecuador is "purely a recent invention of Chevron[T]exaco's lawyers." (Oral Ar. Tr. at 3.) The 1965 JOA and the arbitration clause within it, Plaintiffs contend, do not in any way bind Petroecuador.

a. Governing Law

To decide whether sufficient issues of material fact exist to preclude the grant of summary judgment on the theory that Petroecuador never agreed to arbitrate, it is necessary to ascertain what law governs this Court's determination of whether Petroecuador became bound by the 1965 JOA and the arbitration clause within it. "We first look to the substantive law of the action to determine which facts are material," *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 200 (2d Cir.2004), and to do so, we must know to what substantive law we shall look. Specifically, we must determine whether New York law, federal common law, or Ecuadorian law should

govern the question of whether Petroecuador is bound by an agreement to arbitrate.[15]

Several recent Second Circuit cases support the application of state law to the question of whether a party is bound by a purported agreement to arbitrate. *Bell v. Cendant Corp.*, 293 F.3d 563 (2d Cir.2002), held that "[b]ecause an agreement to arbitrate is a creature of contract ... the ultimate question of whether the parties agreed to arbitrate is determined by state law," and applied Connecticut law to ascertain if the parties had agreed to allow the arbitrator to determine arbitrability. 293 F.3d at 566. *Bell* cited the Supreme Court's statement in *First Options v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), that "when deciding whether the parties agreed to arbitrate a certain matter

[15] Plaintiffs' position on this issue is relatively clear: they contend that "the federal substantive law of arbitration applies to this dispute" and that "[w]hen one party claims the existence of an arbitration agreement and the other party denies it, federal law employs 'generally accepted principles of contract law' to determine whether there is a valid agreement to arbitrate." (Pl. Mem. in Supp. of Mot. for Summ. J. at 4-5) (quoting *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir.1987)). Defendants, in contrast, cite to cases applying New York substantive law, cases applying federal common law, and an affidavit regarding Ecuadorian law (presumably made relevant by the application of either New York or federal choice of law rules), while not explicitly arguing for the application of any particular one of the three. No party has contended that significant differences exist between the applicable portions of these three different possible sources of substantive law. We nonetheless proceed to resolve the question of which law applies because of its critical role in our analysis, and because in a case that comes to this Court under both diversity jurisdiction and federal-question jurisdiction, it is not at all clear whether forum-state law or federal law would be the default option where a true conflict was not demonstrated.

(including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, (2d Cir.2003), in turn cited *Bell* and *First Options* for the proposition that "[w]hether parties have obligated themselves to arbitrate certain issues, including the question of arbitrability, is determined by state law." 322 F.3d at 120. Similarly, *Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 294 (2d Cir.1999), described "the determination that parties have contractually bound themselves to arbitrate disputes" as "a determination involving interpretation of state law." *Accord Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 45-46 (2d Cir.1993) (citing *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). Following these cases here could result in the application of New York substantive law, or possibly the application of Ecuadorian substantive law under New York or federal choice of law rules, Ecuador being a "state" with a significant connection to the relevant contracts.

There is also, however, a line of Second Circuit authority supporting the application of federal common law to questions such as the one at issue here, particularly in cases arising under the New York Convention. *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845 (2d Cir.1987), held, with respect to a motion under the FAA and New York Convention to stay an action pending arbitration, that whether a party was "bound by the arbitration clause of ... sales confirmation forms [including some it did not sign] is determined under federal law, which comprises

generally accepted principles of contract law." In *Thomson-CSF, S.A. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir.1995), the Second Circuit stated that "[the] theories under which nonsignatories may be bound to the arbitration agreements of others ... arise out of common law principles of contract and agency law."[16] *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96-98 (2d Cir.1999), followed *Thomson-CSF's* common law principles in a New York Convention case after holding that "[w]hen we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." 198 F.3d at 96. "Where there is little connection to the forum and the Agreements between the parties state an intention to be governed by the FAA," *Smith/Enron* explains, "proceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law." *Id.* Quite recently, citing *Smith/Enron*, the Second Circuit reaffirmed that "[i]t is American federal arbitration law that controls" the question of whether an American nonsignatory can be bound to arbitrate in a New York Convention case, because "[t]o hold otherwise would defeat the ordinary and customary expectations of experienced

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[16] Neither the Second Circuit's opinion in *Thomson-CSF* nor the district court's opinion in that case, *Thomson-CSF v. Evans & Sutherland Computer Corp.*, 94 Civ. 6181, 1994 WL 593805, 1994 U.S. Dist. LEXIS 15501 (S.D.N.Y. Oct. 28, 1994), specified the basis of jurisdiction.

business persons." *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661-662 (2d Cir.2005).

Strictly speaking, this is probably not a case covered by the New York Convention. The United States and Ecuador are both members of the Organization of American States and parties to the Inter-American Convention, *see* 9 U.S.C.A. § 301 note, so that "a majority of the parties are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States," 9 U.S.C.A. § 305, and thus that Convention rather than the New York Convention appears to apply. This does not alter the choice of law analysis, however. Given Congress's expectation "that courts in the United States would achieve a general uniformity of results under the two conventions," *Productos Mercantiles E Industriales, S.A. v. Faberge USA*, 23 F.3d 41, 45 (2d Cir.1994) (quoting H.R.Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678), and given that the policy concerns motivating the rule in *Smith/Enron* and *Sarhank* apply to Inter-American Convention cases as much as to New York Convention cases, *Smith/Enron* and *Sarhank* strongly suggest that federal common law should govern arbitrability issues in an Inter-American Convention case as well.

If the rule of *Smith/Enron* and *Sarhank* were settled with regard to Convention cases, it would be appropriate to follow it here even though this action comes to the Court under *both* Convention jurisdiction and diversity jurisdiction, *see supra* Part II.A.1. "[T]he goal of simplifying and unifying international arbitration law," *Smith/Enron*, 198

F.3d at 96, would not be any less relevant simply because the parties could also get into court another way. There appears at first glance to be tension between different Second Circuit authorities regarding whether federal common law governs the validity of a party's purported agreement to arbitrate where, as here, the case arises under one of the Conventions and the contract manifesting the purported agreement contains a choice-of-law clause: *Sarhank* held that such a choice-of-law clause was to be ignored in favor of federal common law, while *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir.2004), held that the choice-of-law clause governed. *Sarhank* and *Motorola* can, however, be reconciled.

The appellee in *Sarhank*, proceeding under the district court's 9 U.S.C. § 203 jurisdiction pursuant to the New York Convention, had successfully petitioned for confirmation of "a commercial arbitration award rendered jointly and severally against Oracle [Corporation] and its wholly owned subsidiary Oracle Systems, Inc. ('Systems')," despite the fact that Oracle was not a signatory to either the agreement under which arbitration had been demanded or any other agreement to arbitrate with the petitioner-appellee. 404 F.3d at 658. The arbitration agreement at issue, "a bilateral executory contract" between petitioner-appellee Sarhank and Systems, *id.*, contained a choice-of-law law clause stating that "[t]his agreement shall be construed and governed in all respects in accordance with the laws of the Republic of Egypt and the parties hereto hereby agree to submit to the jurisdiction of the Courts of Cairo." 404 F.3d at 661. The arbitrators had concluded, based on Egyptian contract law, that

Oracle was bound by its subsidiary's signature, *id.* at 662. Notwithstanding the Egyptian choice-of-law clause, the Court of Appeals held that "[i]t is American federal arbitration law that controls" and that "[a]n American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law." *Id.* The case was remanded to the district court "to find as a fact whether Oracle agreed to arbitrate, by its actions or inaction ... or on any other basis recognized by American contract law or the law of agency." *Id.* at 662-63.

The defendants in *Motorola* "sought to compel arbitration under 9 U.S.C. § 206"[17] pursuant to agreements that had been signed by plaintiffs and by certain companies controlled by the defendants' family, but to which the defendants themselves were not parties. 388 F.3d at 42-43, 49. The agreements in question contained Swiss choice-of-law clauses, and the Court of Appeals held that "if defendants wish to invoke the arbitration clauses in the agreements at issue, they must also accept the ... choice-of-law clauses that govern those agreements." Concluding "that under Swiss law ... defendants, as nonsignatories, have no right to invoke those agreements," the Court of Appeals "affirm[ed] the District Court's denial of defendants' motion to compel arbitration." 388 F.3d at 53.

The most reasonable way to reconcile *Motorola* and *Sarhank* is to conclude that a choice-of-law clause

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[17] As its section designation makes apparent, 9 U.S.C. § 206 is part of Chapter Two of the FAA, implementing the New York Convention.

will govern where a nonsignatory to a particular arbitration agreement seeks to enforce that agreement against a signatory, but not where a signatory seeks to enforce the agreement against a nonsignatory. In the former case, exemplified by *Motorola*, the party seeking arbitration must implicitly accept that the contract under which arbitration is sought is valid and binding on it, and the party opposing arbitration has signed the contract, so both parties can reasonably be bound by the choice-of-law clause. In the latter case, exemplified by *Sarhank*, the nonsignatory party opposing arbitration is in essence contending that it is not subject to the contract at all; thus, applying the choice-of-law clause from that contract to determine the issue would beg the question in a manner potentially unfair to the nonsignatory. *Cf. Thomson-CSF*, 64 F.3d at 779 (stating that while "the circuits have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed," this does not logically imply that a signatory can compel a nonsignatory in similar fashion, inasmuch as holdings that "the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves" cannot be extended to "estop[ ] [a nonsignatory] from denying the existence of an arbitration clause to which it is a signatory because no such clause exists.") Here, TexPet, signatory to the 1965 JOA, seeks arbitration, and nonsignatory Petroecuador opposes arbitration. Thus, *Sarhank* rather than *Motorola* controls, and

the federal common law of arbitration agreements applies.

One might argue that the holding of *Sarhank* is inapplicable to this case because that holding dealt with the circumstances under which "an American nonsignatory [could] be bound to arbitrate," 404 F.2d at 662, and this case deals with whether a *foreign* nonsignatory can be bound to arbitrate. *Motorola*, in contrast, dealt with whether a foreign signatory could be bound to arbitrate. If the difference between an American party and a foreign party were more significant than the difference between a signatory and a nonsignatory, therefore, the *Motorola* choice-of-law rule would be applicable here. A reconciliation of *Sarhank* and *Motorola* that would have the choice of governing law in a Convention case depend on the nationality of the party sought to be forced into arbitration, however, is not consistent with the *Smith/Enron* principle that "parochialism" in international arbitration should be avoided in furtherance of "the goal of simplifying and unifying international arbitration law," 198 F.3d at 96. Nothing in either of the Conventions suggests that the validity of an alleged arbitration agreement involving citizens of nations that are signatories to the convention should depend on which signatory nation's citizens resist arbitration. The Second Circuit has attached great weight to the distinction between signatories and nonsignatories, *see, e.g., Merrill Lynch Inv. Managers v. Optibase, Ltd.*, 337 F.3d 125, 131 (2d Cir.2003) (declaring the distinction to be "decisive" and stating that "it matters whether the party resisting arbitration is a signatory or not"); *Thomson-CSF*, 64 F.3d at 779, and a reconciliation of *Sarhank* and *Motorola* based on this distinction is

significantly more consistent with the *Smith/Enron* anti-parochialism principle. Therefore, we will follow *Sarhank* and apply federal common law to the question of whether Petroecuador is bound by the arbitration clause in the 1965 JOA.

b. Evidence for Agreement to Arbitrate Under Federal Common Law

Under federal common law, the Second Circuit "ha[s] recognized five theories for binding nonsignatories to arbitration agreements: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel." *Thomson-CSF*, 64 F.3d at 776. "[A] willing signatory (such as [TexPet]) seeking to arbitrate with a non-signatory that is unwilling (such as [Petroecuador]) must establish at least one of the five theories described in *Thomson-CSF*." *Merrill Lynch Inv. Managers*, 337 F.3d at 131.

[6] Of the five *Thomson-CSF* theories, the most likely to apply in this case is estoppel. "A party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir.1999) (citing *Thomson-CSF*, 64 F.3d at 778-79). Direct benefits are those "flowing directly from the agreement," while "the benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relation of parties to an agreement, but does not exploit (and thereby assume) the agreement itself." *MAG Portfolio Consultant, GMBH, v. Merlin Biomed Group LLC*, 268 F.3d 58, 61 (2d Cir.2001). "To prevail, then, [Defendants] must show that [Petroecuador] 'knowingly exploited'

the ... contract and thereby received a direct benefit from the contract." *Id.* at 62 (quoting *Thomson-CSF*, 64 F.3d at 778).

If Defendants' view of the events surrounding the entry of CEPE/Petroecuador into the Napo Consortium were accepted, it would be reasonable to conclude that Petroecuador knowingly received "direct benefits" from the 1965 JOA, and thereby became estopped from denying agreement to arbitrate under it. As Defendants describe the situation, it was only within the framework of the 1965 JOA that TexPet acted as "Operator" of the Napo Consortium. That is, when TexPet took the lead role in extracting oil from the land covered by the Napo Concession, this action was-on Defendants' account-taken under and because of the 1965 JOA, which all parties understood to govern. On this view, Petroecuador received oil extracted by TexPet, at cost, and had control over various aspects of the extraction of that oil, only because of the 1965 JOA, and knew that it received those benefits because of the 1965 JOA. It was thus analogous to the shipowners in *American Bureau of Shipping*, who received lower insurance rates and registration under the French flag only because of an agreement containing an arbitration clause, and were therefore bound to that arbitration clause despite not being a signatory to the agreement. 170 F.3d at 353.

If one were to accept Plaintiffs' version of the facts, on the other hand, there would be no basis for subjecting Petroecuador to arbitration. If the 1973 Contract was a novation intended by the parties to replace the 1965 JOA, and the subsequent relationship among the Napo Consortium parties was

understood to be "quasi-contractual, governed by an ambiguous amalgam of prevailing 'standards and procedures' " (Pl. Reply in Supp. of Mot. for Summ. J. at 4), then there was no extant contract containing an arbitration clause from which Petroecuador could be said to have derived a direct benefit. Nor would any of the other *Thomson-CSF* theories be applicable, if, as Plaintiffs contend, the 1965 JOA and its arbitration clause have been dead and buried for forty years.

The question, then, is whether there is sufficient evidence in the record supporting Defendants' version of events to raise a genuine issue of material fact regarding whether Petroecuador became bound by the arbitration clause in the 1965 JOA. We answer this question in the affirmative. In so doing, we address only those portions of the record necessary to demonstrate clearly that genuine issues of material fact do exist, and do not attempt an exhaustive description of the voluminous evidence submitted by the parties.

(i) Pareja Affidavit

The first significant piece of evidence that the 1965 JOA was understood to govern the operations of the Napo Consortium after Petroecuador entered it, and that Petroecuador derived significant benefits from the 1965 JOA, is the affidavit of Jorge Pareja Cucalón submitted by Defendants. Mr. Pareja, according to his affidavit, was an employee of Gulf involved in the Texaco-Gulf Consortium from 1969 to 1970, the General Manager of CEPE from 1981 to 1982, and the President of Petroecuador in 1999. He has also served at various times as Chairman of the Petroleum Policy Commission in the Ecuadorian

Ministry of Energy, Ecuador's Ambassador to Austria, Ecuador's representative to OPEC, and Ecuador's Minister of Energy and Mines.

Mr. Pareja avers that because of his duties at Gulf from 1969 to 1970, he "knew about the Napo Joint Operating Agreement entered into by subsidiaries of Texaco and Gulf in 1965 ("Napo JOA")." (Pareja Aff. ¶ 4.) He further avers that "[t]here was no question that, when CEPE became an interest holder in the Napo Concession, CEPE also became a party to the [1965] Napo JOA, as that contract controlled the relationship and operations of the parties to the concession" and that he "always understood, as did CEPE, that the [1965] Napo JOA was the agreement that governed the relationship between TexPet and CEPE regarding oil exploration and production in the Napo Concession." (Pareja Aff. ¶ 9.) The 1965 JOA, according to Mr. Pareja, "delineated the joint rights of CEPE and TexPet, with respect to each other." (Pareja Aff. ¶ 9.)

The Pareja Affidavit also details benefits that CEPE is asserted to have received from the 1965 JOA. The 1965 JOA, Mr. Pareja says, not only "enabled CEPE ... to enjoy its share of the oil produced in the Napo Concession by the Operator, TexPet, but also allowed CEPE, through its representatives, to have significant input into the exploration and production efforts by the Operator." (Pareja Aff. ¶ 9.) According to Mr. Pareja, CEPE was able to approve all "annual work plans and budgets" and to "approve (or not) significant contractual relationships that the Operator wished to enter into with various contractors." (*Id.*) It could thereby "have a voice in the petroleum exploration and production

plans and activities" and "address its own budgetary concerns by being able to seek limits on the programs that the Operator wanted to pursue." (Pareja Aff. ¶ 10.)

(ii) Other Affidavits

Although Mr. Pareja is perhaps the most compelling of Defendants' affiants insofar as he worked for CEPE/Petroecuador during a portion of the relevant time period, other affidavits have also been provided in support of Defendants' contention that the Consortium of which CEPE became a part was understood to operate under the 1965 JOA. It would serve little purpose at this stage to reiterate in detail the averments of former Consortium Operations Manager René Bucaram, former TexPet Chief Counsel Rodrigo Pérez Pallares, or the former manager of TexPet's separate (non-Consortium) office, Donald Sawyer. For summary judgment purposes, it is sufficient to note that they tend to corroborate the statements made by Mr. Pareja.

Defendants have also offered affidavits from proposed expert witnesses Norman N. Anderson and Owen L. Anderson. These affiants address usual practice in the oil industry, and conclude that the Napo JOA was a typical joint operating agreement, and that such operating agreements are generally considered essential where more than one oil-extraction company shares rights under a concession from a host government. They further conclude that pursuant to usual practice in the oil industry, Petroecuador would have been understood to enter the Napo Concession subject to the existing JOA.

(iii) Lack of Explicit Abrogation of 1965 JOA in 1973 Contract

Another piece of evidence that the 1973 Contract was not, as Plaintiffs claim, a novation replacing the 1965 JOA is that the 1973 Contract explicitly replaced several other contracts, but did not mention the 1965 JOA. Paragraph 53.1 of the 1973 Contract stated in relevant part that "the contract executed on August 26, 1961 in its applicable portion, and the contracts executed on March 5, 1964 and June 27, 1969 are completely substituted by the present contract. Consequently, the parties shall hereinafter be governed only by the stipulations set forth in this public instrument." (Perez Aff. Ex. E.) While Plaintiffs focus on the latter sentence, Defendants focus on the former, and the fact that it mentions previous concession contracts between Ecuador and the concessionaires but does not mention the 1965 JOA. Particularly in light of the fact that the 1965 JOA contained a provision declaring itself "binding on the successors and assigns of the Parties" (Perez Aff. Ex. C. ¶ 26.1), this omission of any reference to the 1965 JOA makes it at least ambiguous whether the 1973 Contract was intended to render the 1965 JOA inoperative. And on summary judgment, "all ambiguities ... are viewed in a light most favorable to the nonmoving party." *Vona*, 119 F.3d at 206.

Plaintiffs contend that "the underlying intent behind the 1973 Contract was that all disputes involving the Napo Consortium be resolved in Ecuador" (Pl. Mem. in Supp. of Mot. for Summ. J. at 8), so that at least the arbitration provision of the 1965 JOA must have been abrogated even if some other portions of the 1965 JOA survived. They cite in

support of this contention paragraph 50.1 of the 1973 Contract, which states that "[t]he contractors shall submit to the laws, courts, and judges of Ecuador, to summary verbal proceeding, and expressly waive any claim through diplomatic channels." (Pl.Ex. C. ¶ 50.1.) "The general rule in cases containing forum selection clauses," however, "is that 'when only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.' " *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distributors Inc.*, 22 F.3d 51, 52 (2d Cir.1994) (quoting *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir.1989)). In particular, a clause stating that the parties "submit to the jurisdiction of" a particular state's courts will not be read as exclusive, *Keaty v. Freeport Indonesia, Inc.*, 503 F.2d 955, 956 (5th Cir.1974); one stating that the parties "submit to the ... courts[ ] and judges" of a particular forum would seem to be closely analogous. Moreover, the inclusion of this clause referring to submission of "the contractors" to Ecuadorian courts, in a model contract promulgated by the Ecuadorian government and alleged by Defendants to have been in essence a *concession* contract, could be construed as requiring only that the concessionaires submit to Ecuadorian jurisdiction and laws if disputes arose in their relationship with Ecuador. The clause is not sufficiently clear to preclude the possibility that CEPE/Petroecuador could be estopped from denying the applicability of the 1965 JOA's arbitration clause if CEPE and TexPet had in fact proceeded on the assumption that the 1965 JOA governed their relationship.

The effect of paragraph 43.2 of the 1973 Contract, also cited by Plaintiffs to support their contention that the intent behind that Contract was for all disputes to be resolved in Ecuador, is similarly unclear. It states that "indemnities to be paid by the contractors for the damages caused on lands, crops, buildings or other properties due to the exploration, exploitation or any other phase of the oil industry, shall be determined by experts designated by the parties" and that "[i]n case of disagreement, the Ministry concerned shall appoint a third expert, whose verdict shall be unappealable." (Pl.Ex. C. ¶ 43.2.) This paragraph immediately follows, and is contained within the same "Clause" as, one concerning "[e]xpropriation of lands, buildings, and other properties," which it is provided "shall be effected by the Ministry concerned." (Pl.Ex. C. ¶ 43.1) Viewed in context, therefore, paragraph 43.2 appears to regulate the legal relationship between the concessionaires and the Republic on the one hand, and the local population on the other. It might have been relevant to the question whether the Aguinda Plaintiffs could sue Texaco in the United States, but it does not unambiguously bear on the question whether the 1965 JOA governs the relationship between Petroecuador and TexPet.

(iv) Conflicting and Ambiguous References to 1973 Contract and 1965 JOA in Subsequent Agreements Between the Parties

If the subsequent written agreements entered into by the parties unambiguously clarified that the relationship between CEPE/Petroecuador and TexPet after 1973 was not governed or thought to be governed by the 1965 JOA, then it might be doubtful

whether Defendants could survive summary judgment by pointing to their contrary evidence. While some of the subsequent agreements tend to indicate that the 1973 Contract and not the 1965 JOA controlled, however, the overall picture is not so clear as to justify summary judgment in the face of the evidence offered by Defendants.

(a.) 1974 Contract

The 1974 Contract contains a passing reference to the 1973 Contract, but does not state that the 1973 Contract regulates the relationship between CEPE and the other concessionaires of the Napo Concession. Rather, the 1974 Contract, as translated by Plaintiffs, states that "[t]he totality of the activities that will develop in the Joint Operation will be regulated by an operating agreement entered into by the parts [sic]." (Pl.Ex. Q ¶ 8.) Plaintiffs cite this clause and assert that "neither the Republic nor CEPE/Petroecuador ever entered into such a formal operating agreement with Texaco and/or Gulf." (Pl. Mem. in Supp. of Mot. for Summ J. at 8.)

The lack of mention of the 1965 JOA in the 1974 Contract may tend to suggest that the 1965 JOA was not understood to continue in effect. The 1974 Contract's implication that an operating agreement separate from the 1973 and 1974 Contracts would be required, however, tends to support Defendants' argument that the 1973 Contract did not itself function as an operating agreement, and that industry convention would require one. The 1974 Contract does not address the question of what contract or other legal framework would govern "the activities that will develop in the Joint Operation" in the period before the parties entered into the future

operating agreement to which the 1974 Contract refers. It thus does not decisively resolve the conflict between Defendants' contention that the 1965 JOA was understood to apply in the interim, and Plaintiffs' assertion that the interim relationship was "quasi-contractual, governed by an ambiguous amalgam of prevailing 'standards and procedures' " (Pl. Reply in Supp. of Mot. for Summ. J. at 4).

(b.) 1977 Contract

The 1977 Contract by which CEPE bought out Gulf's remaining portion of the Napo Concession tends to support Plaintiffs' position in this case, but not so definitively as to permit summary judgment in the face of Defendants' contrary evidence. Most favorable to Plaintiffs is paragraph 2.13, which states:

> With respect to any obligations Gulf may have to third parties and which do not appear in its accounts, neither the Ecuadorian government nor CEPE shall assume any responsibility whatsoever, and these must be taken care of by Gulf. Therefore CEPE shall assume only those obligations that are in accordance with this agreement.

(Pl.Ex. O ¶ 2.13.) The arbitration clause of the 1965 JOA could be described as an obligation Gulf had to TexPet, and there has been no showing that it appeared in Gulf's accounts. And although TexPet was not a signatory to the 1977 Contract, paragraph 2.13 could still serve as evidence that CEPE/Petroecuador believed the 1965 JOA to be inapplicable and thus did not "knowingly exploit[ ]" it, *MAG Portfolio Consultant*, 268 F.3d at 62 (quoting *Thomson-CSF*, 64 F.3d at 778).

By the time of the 1977 Contract, however, CEPE had been part of the Napo Concession/Consortium for several years. If the parties understood the obligations of the 1965 JOA to have attached to CEPE, those obligations would have been in place before the 1977 Contract entered the picture. Furthermore, it is not clear that an operating agreement is the sort of "obligation" that would be expected to "appear in [Gulf's] accounts"; it is likely that this wording was meant to refer to monetary liabilities.

(c.) 1985 Agreement

The 1985 Agreement also tends to support Plaintiffs' position that the 1973 Contract and not the 1965 JOA was seen as controlling the relationship between members of the Napo Consortium. The background section of the 1985 Agreement mentions only the 1973 Contract and not the 1965 JOA, although it does not specifically state that the 1973 Contract controlled the relationship between Consortium members or abrogated the 1965 JOA. Even more suggestive are clauses 3.3.1 and 3.3.2 of the 1985 Agreement, which provide respectively that "[t]he parties shall within 30 days commence negotiations for a final Joint Operations Agreement to continue the Consortium's operations" and that "[u]ntil the Joint Operations Agreement becomes effective, the Consortium's operations shall be carried out according to the standards and procedures that have been in force up to now." (Perez Aff. Ex. L, at 5.) Taken together, these clauses seem most consistent with Plaintiffs' view that no Joint Operations Agreement was in force in 1985-which would explain why one had to be negotiated-and that the

relationship of the Consortium parties was instead "quasi-contractual, governed by an ambiguous amalgam of prevailing 'standards and procedures' " (Pl. Reply in Supp. of Mot. for Summ. J. at 4).

It is also possible, however, to read clauses 3.3.1 and 3.3.2 as indicating dissatisfaction by the parties with the then-governing legal regime, and a desire to replace it, while leaving open the question of what the then-governing legal regime actually was. The 1985 Agreement does not specify whether the "standards and procedures that have been in place" were quasi-contractual, or contractual and derived from the 1973 Contract, or contractual and derived from the 1965 JOA. One can imagine a scenario in which Mr. Pareja is correct that during his time as the General Manager of CEPE from 1981 to 1982 the parties believed the 1965 JOA to govern the operations of the Consortium, and yet by the time of drafting of the 1985 Contract, there was sufficient uncertainty in the mind of the drafter regarding what contract or other legal framework governed the Consortium that language was chosen to avoid the question entirely. The 1985 Agreement tends to suggest that the 1965 JOA was not understood to govern the relationship of the parties to the Consortium, but it does not establish that proposition so conclusively as to justify disregarding contrary evidence on a motion for summary judgment.

(d.) 1991 Agreement

Perhaps most favorable to Plaintiffs' position is the 1991 Agreement. The 1991 Agreement does not reference the 1965 JOA at all, or contain any reference to arbitration. It defines the "Contract" as the 1973 Contract, and states that " 'Consortium'...

means the de facto company made up of Petroecuador and Texaco, for the exploration and exploitation of the oil fields assigned hereto by the State, in accordance with the Contract." (Suppl. Kolis Decl. Ex. 1 ¶¶ 1.1-1.2.) It further provides that "[i]f disputes arise between the Parties with respect to the application and/or interpretation of this Agreement, such disputes shall be heard in the Special Court [Juzgado Especial], in accordance with Section 10 of the Hydrocarbons Act" and that "this Agreement and the operations contemplated shall be subject to the laws of Ecuador, and the rules, regulations, contracts and other agreements signed by the parties." (Suppl. Kolis Decl. Ex. 1 ¶¶ 13.1-13.2 (alterations in original).)

This language certainly, as Plaintiffs contend, tends to suggest that their version of events is the correct one. It is conceivable, however, that "the de facto company made up of Petroecuador and Texaco, for the exploration and exploitation of the oil fields assigned hereto by the State, in accordance with the Contract" might refer to the de facto company for the exploration of oil fields that were "assigned by the State ... in accordance with the [1973] Contract"-consistent with Defendants' argument that the 1973 Contract was understood to be a concession contract only-rather than to a "de facto company made up of Petroecuador and Texaco ... in accordance with the 1973 Contract." And while the forum selection clause is helpful to Plaintiffs, particularly because it is "mandatory rather than permissive," *John Boutari & Son*, 22 F.3d at 53, and "[t]he Supreme Court ... has indicated that forum selection ... clauses are presumptively valid where the underlying transaction is fundamentally international in

character," *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362-63 (2d Cir.1993) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972)), the temporal extent of the clause is not so clear as to necessarily wipe out any right of arbitration that TexPet might previously have acquired by estoppel. The 1991 Agreement states that it "shall be effective as of the first day of July 1990." (Suppl. Kolis Decl. Ex. 1 ¶ 3.) Disputes among the parties with respect to their relations before that date therefore may not qualify as "disputes ... between the Parties with respect to the application and/or interpretation of th[e] [1991] Agreement" (Suppl. Kolis Decl. Ex. 1 ¶ 13.1).

(e.) 1995 Settlement

Unlike the 1985 Agreement and the 1991 Agreement, the 1995 Settlement, signed by representatives of Petroecuador, TexPet and Ecuador, tends to suggest that Petroecuador and TexPet understood their relationship as members of the Consortium to have been based on the 1965 JOA. The 1995 Settlement recites that "Compañia Texaco de Petróleos del Ecuador, C.A., and Gulf [Ecuador], which were ultimately succeeded by Texpet and Petroecuador (hereinafter referred to as the 'Consortium'), signed a Joint Operating Agreement with Texpet on January 1, 1965, covering the operation of the Consortium's facilities (hereinafter referred to as the 'Napo Agreement')." (Veiga Aff. Ex. B at 2.) It further recites that "Petroecuador exercised its rights under the Napo Agreement, and replaced Texpet as the operator of the Consortium on July 1, 1990." (Veiga Aff. Ex. B at 3.) The reference to Petroecuador as one of the successors of the 1965

JOA's signatories, and the reference to Petroecuador exercising rights under the 1965 JOA in 1990, both support Defendants' contention that the 1965 JOA was understood to survive with Petroecuador as a party.

(v) Letter From Marco Herrera Balarezo

The 1995 Settlement is not the only post-1973 writing that implies a belief on the part of CEPE/Petroecuador that the 1965 JOA continued to govern. Another such writing, attached as Exhibit F to the affidavit of René Bucaram, is a letter sent to Mr. Bucaram by Marco Herrera Balarezo, "CEPE GENERAL AUDITOR," in November of 1986. In relevant part, the letter, as translated, first complains that

> Operator TEXACO failed to observe Article 8 section (8) of the Napo Joint Operating Agreement, give[n] that cash calls to CEPE were not made "... in writing at least 30 days in advance of the start of the month to which the budget relates ..." but rather generally complied [sic] in the second two weeks of the previous month.

The letter goes on to allege "significant shortages between the amounts in sucres provided by TEXACO and those spent in [various months] ... in which CEPE, on the contrary, had surpluses," and to state that "[i]t has become essential to rationalize cash calls pursuant to Article 8 of the Napo Agreement."

Article 8, section 8 of the 1965 JOA did pertain to the timing of requests for funds by the Operator, and did require such requests to be made 30 days in advance. The wording of article 8, section 8 as quoted in Mr. Herrera's letter does not correspond precisely to the wording of the 1965 JOA, which states in

relevant part that "[t]he Operator shall make written requests at least 30 days in advance of due date" (Perez Aff. Ex. C at ¶ 8.8), but it is possible that the difference is a result of translation from English to Spanish and back to English. In the absence of any other "Napo Agreement" in the record that contains an article 8, section 8, applicable to requests for funds, it is a reasonable inference that the Napo Agreement quoted is the 1965 JOA.

Plaintiffs have suggested, in the course of disputing the significance of a different portion of Defendants' evidence, that "there were actually *two* 'Napo Agreements'-the 1965 Joint Operating Agreement ("JOA") between Texaco and ... Gulf ... and *another agreement* executed years later." (Pl. Reply Mem. in Supp. of Mot. for Summ. J. at 2.) Their evidence for this proposition is a statement in a 1974 letter sent by a TexPet manager to the then General Manager of CEPE, that has been translated as follows:

> As you know, some years ago our Companies reached an agreement on operations that we call the "Napo Operating Agreement." Later on, the Companies prepared a new draft Operating Agreement, which included the experience obtained during that time. Copies of both texts have been sent to you for your review.

(Perez Aff. Ex. G at 1.) The reference to a "new draft Operating Agreement," however, could well refer to an agreement that had not yet been executed by the parties, and there is no evidence in the record that such a new operating agreement was in fact executed until 1991. At the summary judgment stage, where "all ambiguities ... are viewed in a light most

favorable to the nonmoving party," *Vona*, 119 F.3d at 206, the 1974 letter therefore cannot be read to indicate the existence of another Napo Agreement that was binding on the parties during the 1970s and 1980s. It is more significant insofar as it implies that CEPE was provided with a copy of the 1965 JOA, as Mr. Perez states in his affidavit (Perez Aff. ¶ 36).

At this stage, therefore, the November 1986 letter from Mr. Herrera must be read to suggest that CEPE's auditor believed that the 1965 JOA had survived the 1973 Contract and continued to bind the parties, and believed that CEPE was entitled to benefits under the 1965 JOA. Admittedly, as Plaintiffs point out, the letter made no specific reference to the arbitration clause of the 1965 JOA. But on an estoppel theory, the test is whether CEPE/Petroecuador " 'knowingly exploited' the ... contract and thereby received a direct benefit from the contract," *MAG Portfolio Consultant*, 268 F.3d at 62 (quoting *Thomson-CSF*, 64 F.3d at 778), not whether it explicitly acknowledged the existence of the contract's arbitration clause.

2. Doctrine of Waiver

Plaintiffs assert that even if Petroecuador did at some point agree to arbitration, "Texaco" has waived its right to arbitrate by its conduct during the *Aguinda* litigation. Even leaving aside any potential complications arising from the different Identities of the parties to which Plaintiffs collectively refer as "Texaco" in the context of the instant case, the *Aguinda* litigation, and the Lago Agrio litigation, the evidence viewed in the light most favorable to ChevronTexaco and Tex-Pet does not demonstrate a

waiver sufficiently clearly to preclude arbitration under the relevant legal standard.

a. Governing Law

As previously discussed, *see supra* Parts II.A.2 and III.B.1.a, the contract under which arbitration is sought in this case is subject to either the New York Convention or the Inter-American Convention, both of which have been incorporated into the FAA and both of which explicitly incorporate Chapter One of the FAA to the extent that it is not "in conflict" with their more specific provisions, 9 U.S.C.A. §§ 208, 307 (West 2005). The Second Circuit "ha[s] long held that 'once a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability.' " *Gutfreund v. Weiner* (*In re Salomon Inc. Shareholders Derivative Litig.*), 68 F.3d 554, 559 (2d Cir.1995) (quoting *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir.1972)) (alteration in original). Nothing in the specific provisions of either of the Conventions is in conflict with the *Coenen* rule, which therefore applies here.

The question of whether a right to arbitrate has been waived goes to the continued "enforceability" of the arbitration contract. Therefore, under *Coenen*, it is governed by federal law. In applying that law,

> the Supreme Court has instructed that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.' *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). This

> bias in favor of arbitration, 'is even stronger in the context of international transactions.' *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, U.S., 9 F.3d 1060, 1063 (2d Cir.1993).

Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co., 189 F.3d 289 (2d Cir.1999).

b. Merits

Plaintiffs' waiver argument is not strong enough to overcome the bias in favor of arbitration established by *Moses H. Cone*, *Deloitte Noraudit*, and *Chelsea Square Textiles*. Plaintiffs contend that Texaco should have moved in *Aguinda* to compel arbitration against Petroecuador. Unfair prejudice resulted, Plaintiffs say, when Texaco instead relied on the fact that the Republic and Petroecuador could not be impleaded in the United States as a ground for transfer of the case to Ecuador, and then reversed its position on the sovereign immunity of Ecuador and Petroecuador after they had spent eleven years basing their litigation strategy on its former position. Although this argument is superficially attractive, its logic does not survive close scrutiny.

Sovereign immunity for purposes of arbitration, and sovereign immunity for other purposes, do not necessarily go hand in hand. An FSIA provision cited by Plaintiffs abrogates sovereign immunity where

> the action is brought ... to enforce an agreement made by the foreign state with ... a private party to submit to arbitration ... any differences ... which may arise between the parties with respect to a defined legal relationship ... concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to

> arbitrate, if (A) the arbitration ... is intended to take place in the United States, [or] (B) the agreement ... is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards....

28 U.S.C.A. § 1605(a)(6)(A) (West 2005). By its terms, however, this abrogation applies only to an action brought to enforce the arbitration agreement or confirm the arbitration award. It is perfectly consistent to say that a foreign state is immune from jurisdiction in a context *other than* a petition to enforce an arbitration agreement or confirm an arbitration award, but may nevertheless be compelled to arbitrate under § 1605(a)(6)(A).

That being the case, Plaintiffs are left to argue that Texaco should have responded to the *Aguinda* lawsuit by seeking to compel arbitration against Petroecuador. As Defendants do not claim a right to arbitration against the Republic of Ecuador, however, they can reasonably answer that such arbitration would not have solved the problems created in *Aguinda* by the inability to implead Ecuador itself, *see Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534, 542 (S.D.N.Y.2001). Moreover, such arbitration would not even have enabled the Aguinda Plaintiffs, or Texaco, to implead Petroecuador in the *Aguinda* litigation, because Petroecuador would have been subject to jurisdiction under 28 U.S.C. § 1605(a)(6)(A) *only* with respect to the arbitration. Thus, the *Aguinda* court's perceived inability to order effective equitable relief, *see* 142 F.Supp.2d at 542, likely would not have been significantly altered.

While it might have been possible for Texaco to somehow have invoked its purported right to arbitration on behalf of the Aguinda Plaintiffs and brought their claims into the arbitration, the legal feasibility of such an action is unclear at best. It is also unclear whether, even if this could have been done, Texaco would have had any obligation to assist the Aguinda Plaintiffs in joining parties that the Aguinda Plaintiffs could not themselves join, so as to enable litigation in a forum that Texaco opposed; litigants do not generally have an obligation to provide procedural aid to their adversaries. Texaco's failure to attempt such a maneuver is therefore insufficient basis for a finding of waiver.

Plaintiffs also suggest that Defendants have also waived any right to arbitrate through their conduct in this litigation, by asserting counterclaims seeking indemnification, rather than immediately moving to compel arbitration. The counterclaims against Petroecuador, however, are explicitly conditional: Defendants state in their Answer that they "will not seek to litigate these counterclaims against Petroecuador in this Court unless the arbitrability question raised by the Amended Complaint is decided in favor of Petroecuador." (Countercls.¶ 5.) In a procedural system that explicitly permits pleading in the alternative, *see* Fed. R. Civ. Pro. 8(e)(2), such conditional claims do not constitute a waiver of rights that will exist if the condition is not met. Plaintiffs would likely argue that the (unconditional) counterclaims against the Republic of Ecuador are also, in reality, counter-claims against Petroecuador, because on their view the two parties are legally the same. But Defendants have provided sufficient evidence in opposition to this proposition that it does

not make sense to find a waiver based upon their refusal to accept it without question. On Defendants' reasonably supported view of the situation, they have sought arbitration while bringing a conditional counterclaim against the party involved in the arbitration, in case arbitrability is found lacking, and a related unconditional counter-claim against a party not involved in the arbitration. This is not sufficient to create a waiver, given the governing law's strong bias in favor of arbitration.

To the extent that Plaintiffs complain of Texaco's failure, during the pendency of the Aguinda litigation, to initiate arbitration against Petroecuador simply seeking indemnification for Texaco's costs in defending that litigation, they do not state the sort of waiver claim that this Court may properly evaluate. "Ordinarily a defense of waiver brought in opposition to a motion to compel arbitration ... is a matter to be decided by the arbitrator." *Bell v. Cendant Corp.*, 293 F.3d 563, 564 (2d Cir.2002); *S & R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 82-83 (2d Cir.1998). This rule does not apply where "the party seeking arbitration ha[s] already participated in litigation on the dispute" that it seeks to arbitrate. *Bell*, 293 F.3d at 564; *S & R Co.*, 159 F.3d at 83. Here, however, where litigation enters the picture purely as the subject of a claim for indemnification from a third party, it cannot be said that "the party seeking arbi-tration ha[s] already participated in litigation on the dispute" that it seeks to arbitrate, *Bell*, 293 F.3d at 564; *S & R Co.*, 159 F.3d at 83. Such an ordinary waiver claim is therefore "a matter to be decided by the arbitrator." *Bell*, 293 F.3d at 564; *S & R Co.*, 159 F.3d at 83.

3. Act of State Doctrine Applied to 1973 Contract

Plaintiffs' final argument for summary judgment is that allowing arbitration would contravene the 1973 Contract, and that because the 1973 Contract was "an official act of the Ecuadorian State implementing its oil policy" (Pl. Mem. in Supp. of Mot. for Summ. J. at 15), the act of state doctrine compels that it must be followed as a rule of decision. The 1973 Contract, Plaintiffs contend, requires that all disputes related to the Napo Consortium be resolved in Ecuador. Thus, to allow arbitration in the United States, according to Plaintiffs, would be to treat the 1973 Contract as invalid, which would violate the act of state doctrine given the 1973 Contract's official status.

The act of state doctrine, however, does not apply here. The FAA explicitly provides that "[e]nforcement of arbitration agreements ... shall not be refused on the basis of the Act of State doctrine." 9 U.S.C.A. § 15 (West 2005). Although this provision is located in Chapter One of the FAA rather than in the Convention-implementing Chapters Two and Three, Chapter One of the FAA applies to actions brought under the New York and Inter-American Conventions unless it is "in conflict" with Chapters Two or Three or the Conventions as ratified. 9 U.S.C.A. §§ 208, 307. No reason is apparent why 9 U.S.C. § 15 would be in conflict with either of the Conventions or either of the FAA Chapters that implemented them. Thus, 9 U.S.C. § 15 applies here, and enforcement of the arbitration agreement at issue, if otherwise appropriate, "shall not be refused on the basis of the Act of State doctrine." Plaintiffs' third and final argument in favor of summary

judgment therefore fails, and their motion for summary judgment must be denied.

IV. PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS UNDER RULE 12(B)

Although Plaintiffs have styled their motion to dismiss the counterclaims under Rule 12(b) as a single motion, it is in substance two conceptually distinct motions, the first seeking to dismiss the counterclaims for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), and the second seeking to dismiss the counterclaims for failure to state a claim, pursuant to Rule 12(b)(6). Plaintiffs' success with regard to lack of subject matter jurisdiction would moot the portion of their motion to dismiss that asserts failure to state a claim: if this Court lacked subject-matter jurisdiction over Defendants' counterclaims, it would have no authority to determine whether or not they state claims for which relief can be granted. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Thus, the portion of Plaintiffs' motion claiming lack of subject matter jurisdiction will be addressed first.

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Legal Standard

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000). As a general matter, "[t]he burden of proving jurisdiction is on the party asserting it." *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994). "Jurisdiction

must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it." *APWU v. Potter*, 343 F.3d 619, 623 (2d Cir.2003); *Shipping Fin. Services Corp v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998).

"When ... a jurisdictional challenge under Fed.R.Civ.P. 12(b)(1) is addressed to the complaint, a court accepts as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." *Lunney v. United States*, 319 F.3d 550, 554 (2d Cir.2003). "Where jurisdictional facts are placed in dispute," however, "the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." *APWU*, 343 F.3d at 627; *LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir.1999). Plaintiffs' motion to dismiss the counterclaims under Rule 12(b) comes at the initial pleading stage, but both parties have submitted affidavits in connection with the motion. Thus, the Court will assume unchallenged allegations to be true but will not automatically assume the truth of any disputed jurisdictional facts.

2. Analysis

The Foreign Sovereign Immunities Act (FSIA), which establishes a background rule of sovereign immunity accompanied by a specifically enumerated list of exceptions, "provides the sole basis for obtaining [subject matter] jurisdiction over a foreign sovereign in the United States." *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 236 (2d Cir.2002) (alteration in original) (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992)). There is no

dispute that Ecuador and Petroecuador both qualify as foreign states for FSIA purposes. (Am. Compl. ¶¶ 16-17; Ans. ¶¶ 16-17; Countercls ¶ 1.[18]) Thus, the FSIA governs the presence or absence of subject-matter jurisdiction here.

The FSIA bestows upon district courts

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in [28 USC § 1603(a)] as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under [28 USC §§ 1605-1607] or under any applicable international agreement.

28 U.S.C.A. § 1330(a) (West 2005). The general rule, however, is that "[s]ubject to ... international agreements [predating the FSIA] ... a foreign state shall be immune from the jurisdiction of the courts of the United States except as provided in [28 U.S.C. §] 1605 to [28 U.S.C. §] 1607." 28 U.S.C.A. § 1604. Thus, this Court has subject matter jurisdiction if, and only if, plaintiffs Ecuador and Petroecuador are stripped of immunity under 28 U.S.C. §§ 1605-1607,

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[18] Defendants do not dispute Plaintiffs' allegation that "Petroecuador is an agency and instrumentality of the Republic of Ecuador and a foreign state as defined by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603" (Compl.¶ 17), except insofar as they describe that allegation as "stat[ing] legal conclusions to which no response is required" (Ans.¶ 17). In their counterclaims, Defendants then describe Petroecuador as Ecuador's "state-owned oil company" (Countercls.¶ 1), which implies that Petroecuador is an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(b) (and thus a "foreign state" under 28 U.S.C. § 1603(a)) because "a majority of [its] shares or other ownership interest is owned by a foreign state," 28 U.S.C.A. § 1603(b)(2) (West 2005). *See supra* Part II.A.1.

or an applicable international agreement, with respect to Defendants' counterclaims-that is, if and only if one of the FSIA's enumerated exceptions applies. ChevronTexaco and TexPet, as counterclaim plaintiffs, "have the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged [here conceded] foreign sovereign[s]." *Cabiri v. Government of the Republic of Ghana*, 165 F.3d 193, 196 (2d Cir.1999); *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir.1993).

The sole exception claimed by Defendants to be applicable to this case is 28 U.S.C. § 1607(b), known as "the counterclaim exception to the FSIA," *Cabiri*, 165 F.3d at 196. That section provides in relevant part that "[i]n any action brought by a foreign state ... in a court of the United States ... the foreign state shall not be accorded immunity with respect to any counterclaim ... arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C.S. § 1607(b) (2005).

In construing the "transaction or occurrence" test of § 1607(b), the Second Circuit has "look[ed] for guidance" to the identically worded test for compulsory counterclaims under Fed. R. Civ. Pro. 13(a). *Cabiri*, 165 F.3d at 197. The Rule 13(a) test is "construed ... liberally," as " 'not requiring an absolute identity of factual backgrounds ... but only a logical relationship between them.' " *Cabiri*, 165 F.3d at 197 (quoting *United States v. Aquavella*, 615 F.2d 12, 22 (2d Cir.1979)). "The transaction or occurrence standard ....' looks to the logical relationship between the claim and the counterclaim, and attempts to

determine whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit.' " *Cabiri*, 165 F.3d at 197 (quoting *Aquavella*, 615 F.2d at 22).

To apply the *Cabiri* test, we must first determine the nature and "essential facts" of Plaintiffs' claims. The contents of the Amended Complaint are foreshadowed in its first paragraph, where Plaintiffs are described as

> seek[ing] injunctive and declaratory relief against Defendants ChevronTexaco Corporation and Texaco Petroleum Company (collectively "Texaco") for making a meritless arbitration demand against ... Petroecuador before the American Arbitration Association ("AAA"); for asserting a position before this ... Court that directly contradicts the position upon which Texaco prevailed in *Aguinda v. Texaco* ... and for making a claim for indemnification against ... Petroecuador which Texaco waived through its conduct in the *Aguinda* case.

(Am.Compl.¶ 1.) That is, the first paragraph of the Amended Complaint indicates that three things are at issue: an allegedly meritless arbitration demand, an alleged inconsistency between Defendants' positions in this case and Texaco's positions in the *Aguinda* litigation, and a waiver of any claim Defendants might otherwise have had for indemnification against Petroecuador that Texaco allegedly effected by its conduct in the *Aguinda* litigation.

In accordance with this introduction, essentially all of the allegations that follow the first paragraph of the Amended Complaint fall into one of two

categories. The first set of allegations pertains to the contractual relationship among CEPE/Petroecuador, TexPet, Gulf, and the other related companies involved in the exploitation of the Napo Concession, or between those companies and the Republic of Ecuador. This set of allegations is offered to establish the lack of an arbitration agreement binding Petroecuador. The second set of allegations recounts the history of the *Aguinda* litigation and related post-1993 events such as the 1995 Settlement, the 1998 Final Release, and the Lago Agrio litigation. This set of allegations forms the basis for Plaintiffs' claims of waiver and inconsistency.

These two categories of allegations correspond to the two categories of claims for relief that Plaintiffs put forward. Recall that according to the Claims for Relief section of the Amended Complaint, Plaintiffs purport to state four claims. The first three, for collateral estoppel, judicial estoppel, and waiver, assert that Texaco's conduct in the *Aguinda* litigation has caused the Defendants to lose certain rights against Plaintiffs that Defendants might otherwise have had. The fourth claim asserts that Defendants have no valid grounds upon which to demand arbitration against Plaintiffs in the United States, and that Plaintiffs are entitled to a permanent stay of arbitration. That is, the fourth claim corresponds approximately to what we have described as the first set of allegations (pertaining to lack of a contractual obligation to arbitrate), and the first three claims correspond approximately to what we have described as the second set of allegations (pertaining to Texaco's conduct in the *Aguinda* litigation and related post-1993 events).

The Prayer for Relief in Plaintiffs' Amended Complaint, while extensive, is not inconsistent with this view of their claims and allegations. The first two prongs of their requested ten-part declaratory judgment address their collateral estoppel and judicial estoppel claims, both based on Plaintiffs' view of Texaco's conduct in the *Aguinda* litigation. The third prong states that *Aguinda* "involved the same claims, brought by many of the same plaintiffs, as the case currently pending in Lago Agrio, Ecuador on which Texaco seeks indemnification in this matter," which is a logical element of Plaintiff's waiver argument based on the *Aguinda* litigation and related post-1993 events, and the fourth prong states specifically that "Texaco waived any right it may have had to seek indemnification" from Ecuador or Petroecuador in a U.S. forum "[t]hrough its conduct in the *Aguinda* case." (Am. Compl. Prayer for Relief ¶¶ (A)(c)-(A)(d).) The fifth prong states that the 1973 Contract "controls the contractual relationship between the Plaintiffs and the Defendants"(*id.* ¶ (A)(e)), and the seventh prong that "[n]either the Republic of Ecuador nor Petroecuador has ever become a party to the October 22, 1965 Joint Operating Agreement between the Texaco Petroleum Company and the Ecuadorian Gulf Company" (*id.* ¶ (A)(g)). These two statements embody key elements of Plaintiffs' argument that no arbitration agreement binding on Petroecuador exists, an argument that the Court is requested to explicitly confirm by declaring further in the ninth prong that "[n]either the Republic of Ecuador nor Petroecuador has ever agreed to arbitrate any disputes with Texaco in any American forum" and in the tenth prong that "[u]nder either the Federal Arbitration Act or Article

75 of the New York Civil Practice Law and Rules, there are no valid grounds upon which Texaco may demand arbitration against the Republic of Ecuador or Petroecuador in this matter." (*Id.* ¶¶ (A)(i)-(A)(j).) The two prongs of the requested declaratory judgment least obviously related to the waiver argument and the argument against arbitration are the sixth, demanding judgment that "[t]he Republic of Ecuador and Petroecuador are a single party for the purposes of their contractual relationship with Texaco" (*id.* ¶ (A)(f)), and the eighth, demanding judgment that "[n]either the Republic of Ecuador nor Petroecuador has ever made a clear statement waiving its sovereign immunity in the United States in this matter, and there are no grounds upon which to find such a waiver by implication" (*id.* ¶ (A)(h)). Even these, however, both seek to establish portions, if somewhat tangential portions, of the arguments Plaintiffs have put forward in support of their claims that Petroecuador has no obligation to arbitrate and that Defendants have waived or otherwise forfeited any claim to indemnification from Petroecuador. Thus, all portions of the requested declaratory judgment can be understood as related to those two sets of claims and allegations.

The three injunctions requested by the Prayer for Relief in Plaintiffs' Amended Complaint have a similar relationship with those same two sets of claims and allegations. The request for a permanent injunction staying the arbitration proceedings clearly relates to the claim that arbitration is inappropriate. The request for an injunction "barring Texaco from asserting a right to indemnification against the Republic of Ecuador and Petroecuador in this matter" (*id.* ¶ C), broad as it is, can be understood in the

context of the Amended Complaint as stemming from the claim that any such right was lost because of Texaco's conduct in the *Aguinda* litigation. The request for an injunction "estopping Texaco from denying that the Republic of Ecuador and Petroecuador enjoy sovereign immunity in the United States in this matter" (*id.* ¶ B) adds little to the corresponding declaratory-judgment request discussed above.

Having ascertained "the essential facts of [Plaintiffs'] claims," we can now determine whether they "are so logically connected" with the essential facts of the counterclaims "that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Cabiri*, 165 F.3d at 197. Following the example of the Second Circuit in *Cabiri*, this determination shall be made separately with respect to each substantively distinct counterclaim. 165 F.3d at 198 (stating that "[w]e analyze the applicability of the counterclaim exception to each of the claims separately"). Where nominally distinct claims are based "essentially on the same allegations," however, they may be treated together in determining the applicability of the counterclaim exception to the FSIA. *Id.*

Here, although Defendants nominally bring four counterclaims, there are in substance two sets of counterclaims. Defendants' first counterclaim, and a portion of Defendants' fourth counterclaim for declaratory judgment, allege that Petroecuador is obligated to indemnify Defendants for litigation expenses, costs, and any final judgment in the Lago Agrio litigation because of an implied agency relationship between TexPet and Petroecuador with

respect to TexPet's operation of the Napo Consortium. Defendants' second and third counterclaims, as well as the remaining portion of the fourth counterclaim for declaratory judgment, are based on alleged breaches by Ecuador and Petroecuador of the 1995 Settlement and 1998 Final Release. The implied-agency counter-claims are based "essentially on the same allegations" as one another, *Cabiri*, 165 F.3d at 198, and the same can be said of the settlement-based counterclaims. Thus, only two separate determinations are necessary regarding the applicability of the counterclaim exception to the FSIA.

a. Counterclaims Based on an Implied Agency Relationship Between Petroecuador and TexPet

In analyzing whether subject matter jurisdiction is present as to the counterclaims based on an implied agency relationship between Petroecuador and TexPet, it is important to note that because those counterclaims run against Petroecuador only, they have explicitly been made conditional on the Court's finding for Plaintiffs with respect to the arbitrability issue. Thus, the implied-agency counterclaims would only be litigated in the event that the arbitration petition filed by Defendants was determined to lack merit. In analyzing the presence or absence of jurisdiction over the implied-agency counterclaims, we may therefore assume that the initial arbitration petition was meritless. If this is determined not to be the case, then the implied-agency counterclaims will vanish of their own accord and our analysis will be moot.

Proceeding on that assumption, the Court is unwilling to conclude that the FSIA permits what would be colloquially referred to as "sandbagging." Defendants are ultimately responsible for the initiation of this litigation, in that it would not have occurred had Defendants not commenced arbitration proceedings against Petroecuador. If those arbitration proceedings were meritless, then finding Plaintiffs' reaction to them to have created jurisdiction over counterclaims going to the merits of the underlying dispute would result in a significant and unreasonable gap in the wall of sovereign immunity established by the FSIA. Such a result is not compelled by the text of the FSIA or by a proper application of the Cabiri standard.

To find counterclaim jurisdiction here would be to say that a would-be plaintiff who wishes to sue an entity possessing sovereign immunity may simply take the following steps. First, file a meritless arbitration petition against that entity in the United States, and wait for that entity to go to court in an effort to stop the groundless arbitration. Second, if the immune entity chooses to sue in state court to stop the arbitration, remove to federal court, either on the basis of diversity, or on the basis that you have alleged the existence of "an arbitration agreement ... falling under the [New York or Inter-American] Convention," 9 U.S.C.A. §§ 205, 302 (West 2005); *see Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir.2005) (holding that a challenge to the existence of any binding arbitration agreement does not defeat subject matter jurisdiction under the New York Convention). Third, utilize the counterclaim exception to the FSIA to bring an action against the otherwise immune entity. On the theory

implied by Defendants' position, this counterclaim will be within the district court's jurisdiction, so long as it is logically related to the reasons why the arbitration petition lacked merit in the first instance. By alleging that an arbitration agreement existed with respect to any particular contractual relationship, for example, one could utilize this maneuver to obtain federal-court jurisdiction over the merits of a dispute regarding that relationship.

It seems apparent that the policy underlying the FSIA would be frustrated if such a maneuver were allowed to succeed, which suggests that a foreign state lured into the United States courts by a meritless arbitration proceeding should not be stripped of its immunity by the counterclaim exception with respect to counter-claims going beyond the issue of arbitrability. The text of § 1607(b) and the standard enunciated by the Second Circuit in *Cabiri* lead to the same conclusion. Where a foreign state has been lured into court by a meritless arbitration proceeding that it seeks to halt, the "transaction or occurrence that is the subject matter of the claim of the foreign state," 28 U.S.C.A. § 1607(b) (West 2005), is really the meritless arbitration proceeding itself, as distinct from the underlying dispute with respect to which the meritless arbitration proceeding was brought. Therefore, any counterclaims going to the merits of a dispute rather than to arbitrability are not counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state," *id.*, and "considerations of ... fairness" do not "dictate that all the issues be resolved in one lawsuit," *Cabiri*, 165 F.3d at 197. The

entrapped foreign state thus does not lose its sovereign immunity in such a case.

With respect to the counterclaims based on an implied agency relationship between TexPet and Petroecuador, this must be considered as such a case. Although we do not hold that the arbitration demand in this case was meritless, the conditional implied-agency counterclaims against Petroecuador will become effective only if we eventually so hold. Thus, the jurisdictional viability of those counterclaims must be analyzed on the assumption that we *will* so hold, because that is the only circumstance under which those counterclaims are actually asserted.

Admittedly, even on the assumption that the arbitration demand in this case lacked merit, Defendants can be held responsible for the initiation of this litigation only insofar as it seeks to enjoin the arbitration, and not insofar as Plaintiffs have chosen to state broader claims. To the extent that Plaintiffs have freely chosen to avail themselves of this Court's jurisdiction with regard to matters other than the (possibly meritless) petition for arbitration, and have thereby created jurisdiction over counterclaims, they have only themselves to blame. Defendants' arguments in favor of finding a logical relationship between Plaintiffs' claims and the implied-agency counterclaims, however, are not significantly stronger because of Plaintiffs' broader claims for relief than they would have been if Plaintiffs had restricted themselves to requesting a permanent stay of arbitration.

As discussed above, Plaintiffs' allegation and claims for relief fall into two substantive categories: those challenging the applicability of the 1965 JOA

and its arbitration clause, and those asserting waiver or forfeiture of any indemnification rights that Defendants may previously have possessed, based on Texaco's conduct in the *Aguinda* litigation and related post-1993 events. It is only the first class of allegations and claims to which Defendants could reasonably suggest their implied-agency counterclaims are related. That first set of allegations and claims, however, is precisely the set that Defendants provoked by making their arbitration demand. Plaintiffs' gratuitous additions in their Amended Complaint relate to the Aguinda litigation and other "occurrences" dating from 1993 onward; they do not have a logical relationship to counterclaims regarding the Petroecuador-TexPet relationship over the life of the Napo Concession.

Thus, with respect to counterclaims regarding the Petroecuador-TexPet relationship over the life of the Napo Concession, such as the implied-agency counterclaims at issue here, Defendants can invoke in support of jurisdiction only those claims and allegations by Plaintiffs that relate to Plaintiffs' request for a permanent stay of arbitration. Having themselves provoked that request by filing an arbitration petition that for these purposes we must assume was meritless, Defendants cannot rely on it to breach Plaintiffs' sovereign immunity.

b. Counterclaims Based on the 1995 Settlement and 1998 Final Release

The counterclaims based upon the 1995 Settlement and 1998 Final Release do not suffer from the same jurisdictional flaw as the implied-agency counterclaims. They are logically related to portions of Plaintiffs' claims that are not mere defenses

against a possibly meritless arbitration demand, and which therefore arise out of a transaction distinct from the arbitration demand.

The Amended Complaint complains several detailed allegations regarding the 1995 Settlement and 1998 Final Release. Plaintiffs first allege that on December 30, 1994, based on the 1994 Memorandum of Understanding that preceded the 1995 Settlement, "Texaco requested that the District Court in *Aguinda v. Texaco* dismiss the Aguinda Plaintiffs' claims 'in light of the settlement entered into between Texaco and Ecuador.' " (Am.Compl.¶ 41.) They go on to describe the 1995 Settlement in several respects, alleging that it "specifically stated that the Republic of Ecuador and Petroecuador entered into the agreement 'as one Party'," and that while it "released all of the Government's and Petroecuador's claims against the Releasees [i.e., Texaco and its subsidiaries] for Environmental Impact arising from the Operations of the Consortium ...." it "made no mention of third-party claims against Texaco or its subsidiaries for environmental damage caused by Texaco during the period in which it operated the Napo Concession." (*Id.* ¶ 43 [alterations in original].) Plaintiffs then imply that the 1995 Settlement was incorporated into the purported request by Texaco to dismiss the Aguinda action based on an Ecuador-Texaco settlement, alleging that "Texaco's request to the Aguinda Court for dismissal of the Aguinda Plaintiffs' claims based on the 1994 and 1995 remediation agreements was rejected by United States Magistrate Judge Lisa Margaret Smith on June 20, 1995 ... [and] Texaco never appealed t[his] ruling...." (*Id.* ¶ 44.) They further refer to the district court's August 12, 1997 decision in Aguinda as

having "noted that the Republic of Ecuador and Petroecuador had released Texaco from any claims that they might have had against it through the May 4, 1995 settlement agreement." (*Id.* ¶ 54.) Finally, they describe the 1998 Final Release, alleging that in that agreement as in the 1995 Settlement "the Republic of Ecuador and Petroecuador [were] again[ ] acting together as one party, the party of the first part," and that "the 1998 Final [Release] made no mention of third-party claims against Texaco or its subsidiaries for environmental damage caused by Texaco during the period in which it operated the Napo Concession." (*Id.* ¶ 55.)

These allegations do not relate to Plaintiffs' claim that Petroecuador never agreed to arbitrate with TexPet. Rather, they must relate to Plaintiffs' claim that Texaco's conduct in the *Aguinda* litigation and related post-1993 events effected a waiver of any arbitration or indemnification rights that Texaco and its subsidiaries might previously have possessed. They serve as a portion of the basis for the requested declaratory judgment that "[t]he Republic of Ecuador and Petroecuador are a single party for the purposes of their contractual relationship with Texaco" (Am. Compl. Prayer for Relief ¶ (A)(f)), and insofar as they support the indemnification-waiver theory, they are a portion of the basis for the requested injunction "barring Texaco from asserting a right to indemnification against the Republic of Ecuador and Petroecuador in this matter" (*id.* ¶ C).

To the extent that the waiver claim is based on the allegations discussed above, therefore, the 1995 Settlement and 1998 Final Release are among the transactions or occurrences giving rise to it. This

supports the contention that counterclaims based on the 1995 Settlement and 1998 Final Release are "logically related" to the broader claims made by Plaintiffs in their Amended Complaint. As part of that Amended Complaint, Plaintiffs have asserted that the 1995 Settlement and 1998 Final Release do not address third-party claims against Texaco and its subsidiaries; Defendants now seek to prove that they were intended to do so. Plaintiffs' assertions in this regard may be insufficiently central to their claims to serve as a basis for counterclaim jurisdiction if they were the only such basis, but they do provide some support for the exercise of counterclaim jurisdiction, and they are in fact not the only basis.

Further support for jurisdiction over the counterclaims based upon the 1995 Settlement and 1998 Final Release can be found in Plaintiffs' request for a declaratory judgment that "*Aguinda v. Texaco* involved the same claims, brought by many of the same plaintiffs, as the case currently pending in Lago Agrio, Ecuador on which Texaco seeks indemnification in this matter." One of the key issues in the determination whether Plaintiffs have breached the 1995 Settlement and 1998 Final Release in connection with the Lago Agrio litigation, as Defendants claim, is whether the Lago Agrio litigation indeed involves the same claims as were brought in *Aguinda*. Defendants contend that it does not. In their view, while *Aguinda* was an action for relief of damages to individuals, the Lago Agrio litigation is an attempt to vindicate public rights to remediation, rights that according to Defendants were formerly possessed by Ecuador itself and were released by Ecuador in 1995 and 1998. Absent this contention by Defendants, it would be extremely

difficult for Defendants to establish that claims nominally brought by third parties in the Lago Agrio litigation were covered by the 1995 and 1998 agreements between Texaco and Ecuador: it is highly unlikely that a settlement entered into while *Aguinda* was pending would have neglected to mention the third-party claims being contemporaneously made in *Aguinda* if it had been intended to release those claims or to create an obligation to indemnify against them. The declaratory judgment requested by Plaintiffs with respect to the Identity of the claims in *Aguinda* and in the Lago Agrio litigation therefore runs directly against a core aspect of Defendants' settlement-related counterclaims.

Plaintiffs have chosen, in their Amended Complaint, to allege that the 1995 Settlement and 1998 Final Release "made no mention of third-party claims against Texaco or its subsidiaries for environmental damage caused by Texaco during the period in which it operated the Napo Concession" (Am.Compl.¶¶ 43, 55), and to seek a declaration that the *Aguinda* action "involved the same claims ... as the case currently pending in Lago Agrio, Ecuador." Having thus invoked this Court's jurisdiction with respect to two of the core elements of Defendants' counterclaims based on the 1995 Settlement and 1998 Final Release, Plaintiffs cannot assert sovereign immunity against counterclaims that in large part seek to establish the opposite of what they themselves have already contended. The "essential facts" of the waiver claim insofar as it relies on the 1995 Settlement and 1998 Final Release, and of the request for a declaratory judgment regarding the Identity of the claims in Aguinda and in the Lago

Agrio litigation, "are so logically connected" to the counterclaims based on the 1995 Settlement and 1998 Final Release "that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Cabiri*, 165 F.3d at 197.

Plaintiffs argue that Defendants have taken inconsistent positions by successfully asserting in the *Aguinda* litigation that Ecuador and Petroecuador were immune from suit in the United States, and nevertheless contending here that the Court has jurisdiction over counterclaims against Ecuador and Petroecuador in this case. Because the Court's jurisdiction under 28 U.S.C. § 1607(b) derives from the relationship between Defendants' counterclaims and the claims brought by Plaintiffs in their Amended Complaint, this is a non sequitur. That Ecuador and Petroecuador had sovereign immunity before they filed this action, and as a general matter still do, does not imply that they have the same degree of sovereign immunity in this action after voluntarily coming to this Court, making the allegations that they have made, and seeking the relief that they have sought. The circumstances affecting the sovereign-immunity determination have been changed by Plaintiffs themselves.

Plaintiffs' statement at oral argument that all of their claims beyond that for a permanent stay of arbitration are conditional on the failure of their claim for a permanent stay of arbitration does not suffice to justify a dismissal of the settlement-based counterclaims for lack of jurisdiction. Leaving aside that this conditional nature of the broader claims is not apparent from the Amended Complaint, the fact remains that even under Plaintiffs' theory of the

pleadings, they now hold out the possibility of pursuing claims sufficiently broad to confer jurisdiction over Defendants' settlement-based counterclaims. If Plaintiffs suffer defeat on the question of arbitrability, they do not dispute that the Court will then have to address their requests for broader relief. Plaintiffs cannot logically ask the Court to dismiss the counterclaims at this stage in the litigation, while such a possibility remains, based on the assumption that the possibility will not come to fruition. If Plaintiffs are victorious on the arbitrability issue, a renewed motion to dismiss any then-surviving counterclaims for lack of jurisdiction would raise the question whether their declaration of conditionality at oral argument came too late; at this point, that question need not be reached.

B. Motion to Dismiss Counterclaims for Failure to State a Claim

With respect to the implied-agency counterclaims against Petroecuador, the portion of Plaintiffs' motion to dismiss that asserts failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, is mooted by Plaintiffs' victory on the portion of their motion that asserts lack of subject matter jurisdiction. With respect to the counterclaims based on the 1995 Settlement and 1998 Final Release, however, the motion to dismiss for failure to state a claim remains to be adjudicated.

1. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted "if, accepting all the allegations in the complaint as true and drawing all reasonable inferences in plaintiff[s'] favor, the complaint fails to

allege any set of facts that would entitle plaintiff[s] to relief." *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 89-90 (2d Cir.2004); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 194 (2d Cir.2003). As to the counterclaims, of course, the "plaintiffs" for Rule 12(b)(6) purposes are Defendants Chevron Texaco and TexPet.

In evaluating the allegations of a complaint on a motion to dismiss, a court may also consider "documents attached to the complaint as an exhibit or incorporated in it by reference ... matters of which judicial notice may be taken, or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir.1993). Here, the set of such documents includes the 1965 JOA, the 1994 Memorandum of Understanding, the 1995 Settlement and the 1998 Final Release. Also, as "courts routinely take judicial notice of documents filed in other courts ... to establish the fact of such litigation and related filings," *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991), the Court may take notice of the filings made in the Aguinda litigation and the subsequent Lago Agrio litigation in Ecuador.

2. Analysis

a. Act of State Doctrine as Applied to 1973, 1974, and 1977 Contracts

Plaintiffs assert that the Act of State doctrine as applied to the 1973, 1974 and 1977 Contracts requires Texaco to submit its counterclaims to the courts of Ecuador rather than bringing them in this Court. With respect to the counterclaims based on the 1995 Settlement and 1998 Final Release, this

argument fails for two independent reasons. First, as previously discussed, see supra Part III.B.1.b.iii, the forum selection clause in paragraph 50.1 of the 1973 Contract, upon which Plaintiffs rely,[19] is not unambiguously exclusive, as it would have to be to be enforceable under *John Boutari & Son, Wines & Spirits, S.A. v. Attiki Importers & Distributors Inc.*, 22 F.3d 51, 52 (2d Cir.1994), at the motion to dismiss stage. Second, the 1995 Settlement recites that "the '1973 Contract' expired on June 6, 1992," and contains an integration clause stating in part that "[n]o other agreements, oral or otherwise, regarding this Contract, shall be deemed to exist or to bind the Parties hereto." (Veiga Aff. Ex. B at 3, 14.) The integration clause alone would likely be sufficient to establish that the 1995 Settlement is not governed by a forum selection clause contained in a previous contract, and it is certainly not governed by a forum selection clause contained in a contract that it explicitly declares to be defunct.

b. Relevance of 1995 Settlement and 1998 Final Release

Plaintiffs contend that "[t]he 1995 and 1998 agreements between the Republic and Texaco are immaterial to this case." (Pl. Mot. to Dismiss

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[19] Defendants do not dispute that the text of the 1973 Contract may be considered on this motion to dismiss. While the 1973 Contract is not incorporated by reference into Defendants' Counterclaims or relied on by the Counterclaims to any significant degree, its contents have been acknowledged by all parties, and excluding it from consideration under Rule 12(b) would be a pointless exercise in formalism inconsistent with the command of Rule 1 that the Federal Rules of Civil Procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Countercls. at 20.) Those agreements, they say, address only claims by Ecuador and Petroecuador, not claims by third parties. Defendants counter that at least some of the claims brought in the Lago Agrio action effectively are claims by Ecuador, prosecuted on Ecuador's behalf by individual plaintiffs acting as private attorneys general under a 1999 law, and that such claims were intended to be included in the 1995 Settlement and 1998 Final Release.

Plaintiffs argue that they "did not settle any rights for third parties," and in fact "couldn't" have done so. (Oral Ar. Tr. at 23). This argument implicitly relies on the assumption that a settlement in which a sovereign state releases claims can never affect similar claims brought by citizens of that state, an assumption which is at least overbroad. Within the United States, it is an accepted rule of law that "[w]hen a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment." *Satsky v. Paramount Communications*, 7 F.3d 1464, 1470 (10th Cir.1993), *quoted with approval in New York by Vacco v. Reebok Int'l*, 96 F.3d 44, 48 (2d Cir.1996). A settlement embodied in a consent decree can constitute a final judgment for Satsky purposes. *Satsky*, 7 F.3d at 1468. The question is whether something like the *Satsky* rule applies here, where the settlement is not alleged to have been entered as a consent decree, the relief sought is against the sovereign rather than the individuals alleged to be asserting public rights, and American substantive law may not govern in any event because the 1995 Settlement and 1998 Final Release had little connection with the United States.

The Second Circuit has held that "the FSIA requires courts to apply the choice of law rules of the forum state" in order to "ensure that foreign states are liable 'in the same manner and to the same extent as a private individual under like circumstances,' " at least in a case where "the ... court would have applied [forum state] choice of law rules to ... [an] action if the parties before it were all private individuals." *Barkanic v. General Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957, 960-61 (2d Cir.1991) (quoting 28 U.S.C. § 1606). Defendants' counterclaims, like the claims at issue in *Barkanic*, do not raise a federal question in any respect other than having been brought under the FSIA. If the parties before the Court were all private individuals, the counterclaims would be subject to either the Court's diversity jurisdiction under 28 U.S.C. § 1332(a)(2) or its supplemental jurisdiction under 28 U.S.C. § 1367(a). The Court would thus apply the choice of law rules of the forum state. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941); *Rogers v. Grimaldi*, 875 F.2d 994, 1002 (2d Cir.1989). Therefore, under *Barkanic*, the choice of law rules of the forum state govern here as well.

"In New York, the forum state in this case, the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998) (citing *In re Allstate Ins. Co.*, 81 N.Y.2d 219, 597 N.Y.S.2d 904, 613 N.E.2d 936 (1993)). To ascertain whether there is an actual conflict of laws with respect to the counterclaims at issue here, it is necessary to know what the law of Ecuador is: because Ecuador was the place of

execution and performance of the contracts at issue, as well as the place of business of at least some of the parties, it is a logical candidate for the source of governing substantive law, *see Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 618 N.Y.S.2d 609, 642 N.E.2d 1065, 1068-69 (1994).

It has been said that "[i]f the party urging a choice of law analysis fails to demonstrate a true conflict between New York and another state's laws, no choice of law analysis need be undertaken." *Bass v. World Wrestling Fed'n Entm't, Inc.*, 129 F.Supp.2d 491, 504 (E.D.N.Y.2001) (citing *Portanova v. Trump Taj Mahal Assocs.*, 270 A.D.2d 757, 759-60, 704 N.Y.S.2d 380 (3d Dep't 2000).) While Plaintiffs have indicated that they believe the law of Ecuador to control, they have not specifically demonstrated a conflict between Ecuadorian law and New York law. The Second Circuit in *Curley*, however, "urge[d] district courts to invoke the flexible provisions of Rule 44.1 [of the Federal Rules of Civil Procedure] to determine issues relating to the law of foreign nations," rather than "avoid[ing] a full analysis of [that] law simply on the basis of an inadequate submission by one party." 153 F.3d at 13. With respect to this issue relating to the law of a foreign nation, we will not simply rely on Plaintiffs' failure to demonstrate a true conflict, but will instead look to the broader sources of information permitted by Rule 44.1 in order to ascertain Ecuadorian law and thereby determine whether a true conflict exists.

One important source of information under Rule 44.1, although not the only permissible source, is submissions by the parties. While Defendants have submitted an affidavit from Dr. Gustavo Romero-

Ponce addressing certain aspects of the Ecuadorian law of contract interpretation, this affidavit does not address whether any special rule exists for contracts or settlements entered into by the Ecuadorian state. Plaintiffs also have not addressed what Ecuadorian law would be with respect to a contract or settlement entered into by the state and subsequent assertion of related public rights by third parties. Nor has either side addressed whether Ecuadorian law permits the government in power at a given time to make a contractual commitment to a private party that would bind a future government not to pass certain legislation on pain of liability for damages, as Defendants arguably assert that the 1995 Settlement and the 1998 Final Release did with respect to the 1999 environmental law on which Defendants allege many of the claims in the Lago Agrio litigation to be based. Rather than "avoid[ing] a full analysis of [Ecuadorian] law simply on the basis of ... inadequate submission[s]," *Curley*, 153 F.3d at 13, we will follow the example of the Second Circuit in *Curley* and request further briefing regarding Ecuadorian law.[20] This briefing may be accompanied by affidavits if the parties so desire, but the parties are reminded that Rule 44.1 does not require materials considered in the determination of foreign law to be admissible under the Federal Rules of Evidence.

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[20] The request for further briefing in *Curley* was made "after oral argument" rather than in the Second Circuit's initial opinion, 153 F.3d at 12, but in *Curley* subject matter jurisdiction over the relevant claim was not in doubt; here, an immediate call for further briefing could have been wasteful if the Court had found a lack of subject matter jurisdiction as to all of the counterclaims.

In their supplemental submissions regarding the Ecuadorian law that would apply to the counterclaims based on the 1995 Settlement and 1998 Final Release, the parties should also address whether they agree that Ecuadorian law governs. Because under New York law "parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied," *Martin v. Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687, 332 N.E.2d 867, 869 (1975), agreement on this question could render a choice of law analysis unnecessary.

V. FURTHER PROCEEDINGS AND OTHER MOTIONS

A. Stay of Arbitration

Pending final resolution of the arbitrability issue, it is appropriate to continue the stay of arbitration proceedings that is presently in effect. In *Bensadoun v. Jobe-Riat*, 316 F.3d 171 (2d Cir.2003), the Second Circuit, remanding an action for an injunction barring arbitration after holding that material issues of fact existed as to arbitrability, instructed that "[u]pon remand, the District Court should stay arbitration pending resolution of this lawsuit." 316 F.3d at 178. The situation here is analogous to that upon remand in *Bensadoun*. *See also Ryan, Beck & Co., LLC v. Fakih*, 268 F.Supp.2d 210, 231 (E.D.N.Y.2003) (citing *Bensadoun* and staying arbitration pending resolution of suit for a declaration of non-arbitrability).

B. Motion for Stay of Discovery

Plaintiffs moved for a stay of discovery pending resolution of the dispositive motions to which this Opinion and Order is addressed, a request that is

now largely but not entirely moot given the Court's resolution of all aspects of the dispositive motions other than the motion to dismiss the settlement-based counterclaims under Rule 12(b)(6). The arguments made by Plaintiffs in support of their request for a stay rely in large part on the "threshold" nature of questions of law regarding "jurisdiction and arbitrability" (Pl. Mem. in Supp. of Mot. to Stay Disc. at 4), and the specific discovery requests to which they object also appear to be related to aspects of this case other than Defendants' settlement-based counterclaims. The extant motion for a stay of discovery is therefore denied on the ground that the only portion of it not now moot is inadequately supported.

This denial is without prejudice to a renewal of the motion with respect to the counterclaims as to which the Motion to Dismiss has not been fully resolved, if supported by reasons specific to those counterclaims and restricted to discovery requests that can be justified only by reference to those counterclaims. Absent any such renewed motion, Plaintiffs shall have thirty days to respond to Defendants' discovery requests, as the parties appear to agree that this amount of time is appropriate.

C. Motions Regarding Filings

There remain three outstanding motions regarding the propriety of certain of the parties' filings. The only portion of Plaintiffs' motion to strike certain of Defendants' filings as untimely, or, in the alternative, for a preliminary injunction and additional time to reply, that is not now moot is the portion requesting that Defendants' filings be stricken. No sufficient cause to strike Defendants' filings having been

shown, the motion is denied. Also outstanding are Defendants' motion for permission to file sur-replies in opposition to Plaintiffs' motions for summary judgment and to dismiss the counterclaims, and Plaintiffs' motion for permission to file a response to those sur-replies. Defendants' sur-replies having contained relevant information that actually tended to support *Plaintiffs* (in particular the text of the 1991 Agreement), it would not make sense to strike them from the record at this juncture, but the submission of those sur-replies was sufficiently irregular to justify Plaintiffs' response; the two motions for permission are therefore granted.

D. Sequence of Further Proceedings

Resolution of Plaintiffs' broader claims beyond that for a permanent stay of arbitration will necessarily await resolution of their demand for such a stay, now that the broader claims have been declared conditional on such a permanent stay being denied.

VI. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Summary Judgment (dkt. no. 36) is DENIED. Plaintiff's Motion to Dismiss Counterclaims Under Rule 12(b) (dkt. no. 31) is GRANTED IN PART, insofar as it asserts that the Court lacks subject-matter jurisdiction over the counterclaims based on an alleged implied-agency relationship between Petroecuador and TexPet, and is DENIED IN PART, insofar as it asserts that the Court lacks subject-matter jurisdiction over the counterclaims based on the 1995 Settlement and 1998 Final Release; DECISION IS RESERVED IN PART with respect to that portion of the Motion to Dismiss Counterclaims Under Rule 12(b) that asserts that the counterclaims

based on the 1995 Settlement and 1998 Final Release fail to state a claim upon which relief can be granted. Plaintiffs' Motion to Stay Discovery Pending Resolution of Dispositive Motions (dkt. no. 45) is DENIED, in part as moot and in part on the merits. Plaintiffs' Motion to Strike Defendants' Responses as Untimely and For Entry of Judgment or, in the Alternative, For a Preliminary Injunction and Additional Time to Reply (dkt. no. 49) is DENIED, in part as moot and in part on the merits. Defendants' Motion for Leave to File Sur-Replies in Opposition to the Republic of Ecuador's and Petroecuador's Motion for Summary Judgment and Motion to Dismiss (dkt. no. 59) is GRANTED, and Plaintiffs' Motion for Leave to File Response to Defendants' Sur-Replies (dkt. no. 63) is GRANTED.

The parties are directed to submit supplemental memoranda within ninety (90) days of the date of this Opinion and Order, addressing the law of Ecuador as it applies to the counterclaims based on the 1995 Settlement and 1998 Final Release, and addressing whether in their view the law of Ecuador does govern those counterclaims. The parties are further directed to advise the Court in writing when they would be ready for a trial of Plaintiffs' claim for a permanent stay of arbitration. Pending final resolution of the arbitrability question or further order of this Court, the presently effective temporary stay of arbitration proceedings is continued.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of December, two thousand and eight,

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The Republic of Ecuador and Petroecuador,
Petitioners-Counter-Defendant-Appellees,

v.

Chevrontexaco Corporation and Texaco Petroleum Company,
Respondents-Counter-Claimants-Appellants.

ORDER

Docket Number: 07-2868-cv

Appellants, ChevronTexaco Corporation and Texaco Petroleum Company, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel

rehearing, and the active members of the Court having considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.
For the Court:
Catherine O'Hagan Wolfe, Clerk

By: s/_____.
Frank Perez, Deputy Clerk

United States Code
Title 9. Arbitration
Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

§ 201. Enforcement of Convention
The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention
An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy
An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 204. Venue
An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

§ 205. Removal of cases from State courts
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for

removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

§ 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in

conflict with this chapter or the Convention as ratified by the United States.

United States Code
Title 9. Arbitration
Chapter 3. Inter-American Convention on International Commercial

§ 301. Enforcement of Convention
The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

§ 302. Incorporation by reference
Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

§ 303. Order to compel arbitration; appointment of arbitrators; locale
(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.
(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be

appointed in accordance with Article 3 of the Inter-American Convention.

§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

§ 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

§ 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the Staten where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the

arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State

which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of

the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State

transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Done at New York June 10, 1958; entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 U.S.C. 201-208

States which are parties

***

Ecuador[8]

***

United States[29]

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[8] Ecuador, on the basis of reciprocity, will apply the Convention to the recognition and enforcement of arbitral awards made in the territory of another contracting State only if such awards have been made with respect to differences arising out of legal relationships which are regarded as commercial under Ecuadorean law.

[29] "The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

"The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States."

The Convention applies to all of the territories for the international relations of which the United States is responsible.

INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions

of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of the State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.

Article 6

If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such

decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guarantees.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification. For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the thirtieth day

after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments or ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

[Signatures omitted]

Inter-American Convention of International Commercial Arbitration. Done at Panama City January 30, 1975; entered into force for the United States October 27, 1990.

[Implementing Legislation: Pub.L. 101-369, Aug. 15, 1990, 104 Stat. 448.]

States which are parties

***

Ecuador

***

United States[1]
***

[1] In accordance with Article 8 of the Convention, the Instrument of Ratification of the Government of the United States of America was deposited with the Secretary General of the Organization of American States on September 27, 1990.

In ratifying the aforesaid Convention, the Government of the United States of America made the following reservations:

"1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties are citizens of a state or states that have ratified or acceded to the Inter-American Convention and are member states of the Organization of American States, the Inter-American Convention shall apply. In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.

"2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits the instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.

"3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."

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(2)

Supreme Court, U.S.
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MAY 26 2009
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No. 08-1123

In the Supreme Court of the United States

CHEVRONTEXACO CORPORATION and
TEXACO PETROLEUM COMPANY,
Petitioners,

v.

REPUBLIC OF ECUADOR and PETROECUADOR,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the doctrines of (a) contract-by-estoppel or (b) implied assumption of contract obligations can bind a public agency of a foreign sovereign to the terms of an otherwise illegal public contract where, among other things: (1) the public agency never executed the contract; (2) the parties never sought the statutorily-required approvals necessary for its execution; (3) the contract contained provisions expressly prohibited by the foreign sovereign's constitution and laws; and (4) no party "reasonably relied" on the contract as being legally binding?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, respondents state as follows:

The Republic of Ecuador and PetroEcuador are a sovereign government and an agency of the sovereign, respectively.

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A. Even after summary affirmance, the district court's decision is not "Second Circuit law." 18

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A. The district court's decision rests on an alternative fact-bound holding, unchallenged in the petition, that petitioners themselves did not believe the 1965 JOA was binding on PetroEcuador. 28

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INTRODUCTION

Putting aside the fact that a summary affirmance cannot by its nature create a true circuit conflict, petitioners' request for review rests upon a fundamental mischaracterization of the decision below. Contrary to petitioners' repeated suggestion, the district court did not decide the general question of when a sovereign government can become bound by a contract that it did not sign, much less decide that question in a way that conflicts with the Federal Circuit's decision in *Hardie v. United States*. Instead, the district court addressed only the use of estoppel against a *foreign government entity*, necessarily applying applicable *foreign* law governing the formation of public contracts. That issue is vastly different from that in *Hardie*, which addressed estoppel against the United States government under our *domestic* contract law.

But even if the general question presented in the petition were actually presented by this case—which it is not—this factually complicated case would be a poor vehicle with which to address that question. Indeed, petitioners do not even challenge the district court's well-documented findings, grounded in petitioners' own contemporaneous internal documents, that their management believed that PetroEcuador was *not* bound by the contract in question. Given these findings, petitioners cannot possibly show "reasonable reliance" sufficient to bind PetroEcuador to a contract which had never been presented to it for signature, much less authorized and executed by it in the manner legally required of an Ecuadorian public contract. And, in any event, the decision under review is an interlocutory ruling

that leaves petitioners with plenty of opportunities to resist the massive liabilities they fear.

STATEMENT

A proper understanding of the district court's decision requires some familiarity with the history of the underlying dispute. That history plainly shows that respondent PetroEcuador, a government agency created to participate in domestic hydrocarbon exploitation, never became a party to the 1965 Joint Operating Agreement ("1965 JOA") on which petitioners have built their case.[1] More importantly, the record shows that petitioners could not have thought, and (as their own documents show) did not in fact believe, that PetroEcuador was bound by the 1965 JOA.

The 1964 Concession and the 1965 JOA. In 1964, the Republic of Ecuador ("the Republic") entered into an oil concession agreement with Texaco[2] and Gulf, Inc. (the "1964 Concession") for the exploration and exploitation of hydrocarbons in the Oriente [Eastern] region of Ecuador. This 1964 Concession was subsequently registered in the government's Office of Hydrocarbons. A-921.[3] As required by the government's Supreme Decree authorizing the 1964 Concession, that concession

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[1] Actually, the Republic created PetroEcuador's predecessor, "CEPE," which for convenience will be referred to as PetroEcuador.

[2] For purposes of this Opposition, it is not necessary to distinguish between petitioners' parent and subsidiary companies, all of which will be referred to herein as "Texaco."

[3] A-__ refers to the Joint Appendix filed in the Court of Appeals.

provided that all disputes between the Republic, Texaco or Gulf with respect to the 1964 Concession would be resolved in *Ecuadorian* courts under Ecuadorian law. A-881 ¶42.

The next year, Texaco and Gulf executed the 1965 JOA in Florida to govern their joint exploitation of the 1964 Concession. Pet. App. 6a. The 1965 JOA contained (a) an arbitration clause requiring Texaco and Gulf to submit disputes between them to the AAA in New York; (b) a clause providing that the two private concessionaires would indemnify the Operator (Texaco) from all third-party claims that might be made against it; and (c) a choice-of-law clause stating that the agreement would be governed by the laws of New York, except for those matters "necessarily governed by the laws of the Republic of Ecuador." Pet. App. 40a-41a.

The 1965 JOA was not recorded in the Republic's Hydrocarbons Registry, as it was a private agreement negotiated and executed in the United States by two U.S. companies. Under Ecuadorian law, as of 1971 any hydrocarbon-related agreement that bound either the Republic or an instrumentality of the government had to be recorded with the Hydrocarbons Registry as a condition of its enforceability, A-498 ¶41, A-503 ¶58; A-962, whereas such agreements among purely private parties did not have to be so recorded.

Termination of the 1964 Concession and Execution of the 1973 Concession. In 1971, the Republic created PetroEcuador's predecessor, whose purpose was to own, explore, produce, process, transport and market all hydrocarbon resources within Ecuador. A493 ¶¶21-22. Later

that year, the Republic also enacted a new Hydrocarbons Law which, among other things, set up the Hydrocarbons Registry and prescribed new contracting methods and terms for petroleum concessions. A-493 ¶22 nn.6-7.

In 1973, Texaco and Gulf entered into a new concession contract with the Republic (the "1973 Concession"). A-507 ¶78; A-774-817. The purpose of the 1973 Concession was to terminate and replace the 1964 Concession, in line with the Republic's simultaneous termination of all other prior hydrocarbon concession contracts granted by the Republic to other concessionaires in Ecuador. A-814 ¶53.1; A-969. The 1973 Concession also contained an option for PetroEcuador to acquire up to a 25% participation interest in the 1973 Concession by 1977. A-911 ¶34. The 1973 Concession continued to require the parties to submit any dispute that might arise under it exclusively to the laws and courts of Ecuador. A-812 ¶50.

The next year, the Republic, PetroEcuador, Texaco, and Gulf entered into a purchase agreement, effective as of June 6, 1974 (the "1974 Agreement"). Under that agreement, and for a substantial payment, PetroEcuador acquired equally from Texaco and Gulf a 25% participation in the 1973 Concession, including all investments, operations, costs, obligations, royalties and crude oil sales. A-977-81, A-979-80 ¶¶7, 10.

The 1974 Agreement expressly contemplated the future negotiation and execution of "an Operation Agreement *to be subscribed* by the parties," which would govern all of the hydrocarbon exploration and production activities to be performed by the new consortium. Resp. App. 4 (A-979) ¶8 (emphasis added). The 1974 Agreement did not

reference the 1965 JOA or make any provisions for Operator indemnification or dispute resolution.

Negotiations for a New JOA. Following execution of the 1974 Agreement, and in accordance with its stated terms, Texaco and Gulf both agreed that a new tripartite operating agreement should be signed between themselves and with PetroEcuador that would govern the Texaco-Gulf-PetroEcuador consortium's activities. Resp. App. 6 (A-997). Indeed, Gulf repeatedly advised Texaco that all ancillary agreements based on the 1964 Concession, including the 1965 JOA, had terminated when the 1973 Concession became effective, and therefore that a new legally enforceable joint operating agreement among the three parties was required. Resp. App. 37-40 (A-4774-76) ¶¶9, 12-14. PetroEcuador likewise shared its similar view, in communications to Gulf and Texaco, that the 1974 Agreement required new agreements to "govern the contractual and operational relations of the [PETROECUADOR]-TEXACO-GULF Consortium." Resp. App. 42 (A-4782).[4]

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[4] *See also* A-4656 ("[A] new operational agreement was required ... between the three parties. This was the first time [PetroEcuador] was going to be participating with its own personnel and with the personnel of Texaco and Gulf.... We knew that ... any new agreement or contract had to be subject to the laws and the judges and had to be done with the authorization of our government."); A-4658-59 (after the 1974 Agreement had been signed, the Minister of Energy and Natural Resources advised Texaco that they needed a new operating agreement since the Gulf-Texaco 1965 JOA, not being subject to the laws and courts of Ecuador, was not valid or enforceable); A-4642-43 (the 1965 JOA was nothing but a reference and did not bind PetroEcuador to anything).

To fill this void, almost immediately after signing the 1974 Agreement, Texaco, Gulf and PetroEcuador began negotiating the terms of a three-way joint operating agreement ("JOA"). As a starting point, Texaco sent PetroEcuador a copy of the 1965 JOA and a draft of a new three-way JOA based on the 1965 JOA. A-987. Significantly, neither at this point nor at any time during the parties' relationship did Texaco ask PetroEcuador to sign the 1965 JOA or to commit to its terms. Resp. App. 1-3 (A-960-61), A-965; A-987; A-968; A-999-1000; A-1006; A-1009; A-1010; A-1017-18, A-1019.

Early in the negotiations for a JOA, moreover, PetroEcuador, as an organ of the State, explicitly rejected Texaco's draft provision requiring that disputes be settled through arbitration. Pet. App 8a-9a. Texaco management acknowledged internally that PetroEcuador's rejection of the proposed arbitration provision "was expected," A-1035, ¶ 43, and all subsequent JOA drafts provided that disputes would be settled, as required under the Hydrocarbons Law, pursuant to Ecuadorian laws and procedures. *See, e.g.*, A-1081 ¶15.1; *see also* A-4618 (it would be "unusual" for any national oil company to agree to be bound by foreign law).

Texaco also recognized that, to be executed by and bind PetroEcuador, any JOA would first have to have, among other things, the requisite "[a]pprovals of [the] Solicitor Gen[eral], [the Board] of Dir[ectors] of [PetroEcuador], [the] National Security Council, [the] Joint Command of Armed Forces, [and the] Comptroller General," as well as approval by the Ministry of Natural Resources. A-1022, A-1030; *see also* A-959 ("Every contract entered into by the State generally re-

quires many internal approvals"); A-1011, A-1012 (approval by Ministry of Natural Resources and often Ministry of Finance was normally required before PetroEcuador could become legally bound).

Although multiple drafts were exchanged intermittently over the years, the parties were unable to reach agreement on the terms of a JOA until 1991. Pet. App. 8a. During this period, Texaco continued to act as consortium Operator on an interim or *ad hoc* basis with "the tacit agreement of [PetroEcuador] and Gulf," because "an operating agreement between the consortium members ... had not been signed." Resp. App 8 (A-1086); *see also* A-3377. For this reason, Texaco described its current position as the "*de facto* operator" of the consortium. Resp. App. 35 (A-4472).

All three consortium members believed the 1965 JOA did *not* legally bind PetroEcuador—and Gulf believed it no longer even bound Gulf and Texaco *inter se*. For example, throughout 1975 and 1976, Gulf sent Texaco numerous letters stating that the 1965 JOA had been terminated, and that "existing operations ... are being handled on a *de facto* basis until such time as the new operating agreements are finalized." Resp. App. 38 (A-4774) ¶10; Resp. App. 9-10 (A-1092); A-4777-81; A-1093-95. Texaco thereafter advised its outside auditor that "Gulf considers Napo Joint Operating Agreement [the 1965 JOA] terminated August 1973 and Napo Accounting Procedures are used merely for quote interim guidance unquote." Resp. App. 15 (A-1111). Moreover, in their joint telex to their respective supervisory offices in the United States, the local general managers for *both* Texaco's and Gulf's Ecuadorian operations complained that, in the absence of a "an operating

agreement regulating joint operating activities[,] ... we have been operating on an *ad hoc* basis whereby [PetroEcuador] is free to place whatever interpretation it likes on the [1974 Agreement]." Resp. App. 11 (A-1096). For its part, Texaco acknowledged that the 1965 JOA had never been "formally adopted by [PetroEcuador]"; that during the pendency of the negotiations, the consortium was "working under a *de facto* [operating company] arrangement"; and that "[u]ntil an agreement on new operating procedures can be reached, [Texaco] shall continue to apply its own internal rules concerning management, administration, and the approval of outlays in all phases of the joint operations." Resp. App. 26 (A-1388); Resp. App. 28 (A-1391); Resp. App. 21 (A-1344).

Further evidencing all parties' contemporaneous understanding that PetroEcuador was not bound by the 1965 JOA, the Operator's monthly "cash call" letters sent by Texaco to PetroEcuador neither cited to nor even mentioned the 1965 JOA or that document's "cash call" procedures. *See, e.g.*, A-3202; A-1102. Indeed, in Texaco's initial letter to PetroEcuador explaining the "cash call" procedures, Texaco not only failed to advise PetroEcuador that its "cash call" obligations were governed by the 1965 JOA (as it advised Gulf), but specifically advised PetroEcuador that only the signatory "parties" to that document were subject to the 1965 JOA's penalty provisions for tardy payment—*specifying Texaco and Gulf as the only two "parties" to the 1965 JOA*. Resp. App. 13 (A-1098).

Texaco's consistent failure to mention the 1965 JOA in its monthly "cash call" letters to PetroEcuador is especially significant because, in contrast,

its simultaneous "cash call" letters sent to Gulf expressly invoked the cash call provisions of the 1965 JOA. A-1104-10. Gulf, however, replied by letter that the 1965 JOA was no longer effective *even between Gulf and Texaco.*

As did Texaco and Gulf, PetroEcuador complained about problems stemming from the absence of a binding three-way JOA. PetroEcuador viewed the 1965 JOA as a merely "referential" document that could be used on an *ad hoc* basis for informal guidance in the absence of a binding agreement. Resp. App. 17 (A-1112) (citing "the lack of an adequate legal instrument governing the relations of the co-owners and regulating the procedures of such operation *since ... [the 1965 JOA] ... [was] only [a] referential document for the solution of controversies that may arise.*") (emphasis added).

On May 27, 1977, PetroEcuador purchased Gulf's remaining 37.5% share of the 1973 Concession through a purchase agreement duly registered in the Hydrocarbons Registry (the "1977 Gulf Agreement"). The 1977 Gulf Agreement provided that PetroEcuador would assume only those obligations referred to in that agreement, and cautioned that neither PetroEcuador nor the Republic was thereby assuming any obligation that Gulf may have had to third parties not expressly listed in its financial statements as a disclosed liability. A-1317 §2.13; A-1340. This agreement did not contain any provision requiring PetroEcuador to assume the 1965 JOA or any obligation that Gulf owed to Texaco thereunder. In fact, the 1977 Gulf Agreement referred solely to the 1973 Concession as the contractual basis for the relationship between the three concession-

aires. A-1312. Consistent with its earlier-stated position, Gulf did not mention the 1965 JOA in the 1977 Agreement. A-1312-20.

Because there was still no legally enforceable operating agreement to govern the PetroEcuador-Texaco relationship, Texaco advised PetroEcuador that, until an operating agreement could be signed, operations would continue to proceed informally through consensus and Texaco's "internal rules," Resp. App. 21 (A-1344), which were essentially its operating, financial and administrative manuals codified from standard oilfield practices.

The Change-of-Operator Agreement and Expiration of the 1973 Concession. In a 1985 Change-of-Operator Agreement, "[t]he parties ... reaffirm[ed] PetroEcuador's right as majority partner to take over the Consortium's operations," but also stipulated that Texaco would continue as Operator until PetroEcuador concluded it was ready to take over that role. Resp. App. 24 (A-1361-62) ¶¶2.1, 3.3. In addition, PetroEcuador agreed to give Texaco one year's advance notice of its intent to take over operation of the consortium. A-1363 ¶3.3.5.

For purposes of Texaco's interim service as Operator of the consortium, and in recognition of the fact that after almost ten years Texaco and PetroEcuador still did not have a binding JOA, the 1985 Agreement provided that "[t]he parties shall within 30 days commence negotiations for a final Joint Operations Agreement to continue the Consortium's operations," and that "[u]ntil the Joint Operations Agreement becomes effective, the Consortium's operations shall be carried out according to *the standards and procedures that have been in force up to now*." Resp. App. 24 (A-1362) ¶¶3.3.1,

3.3.2 (emphasis added). The omission of any reference to interim operations being carried out *under the 1965 JOA* is telling. Had Texaco truly believed the 1965 JOA was still in force, it would never have made alternative reference to unidentified "standards and procedures."

Although the 1985 Agreement provided that negotiations for a JOA were to commence within 30 days, no consensus on the terms of a JOA was reached until 1990. Throughout the intervening period, PetroEcuador continued to note that there was no binding legal authority governing the operations of the consortium. Thus, the PetroEcuador Audit Report for 1984, a copy of which was provided to Texaco at the time, stated that "there is no Joint Operating Agreement between PetroEcuador and Texaco which has been declared to be valid and effective by the parties." Resp. App. 29 (A-1393). Similarly, the 1985 Audit Report, a copy of which was provided to the officers of the consortium on March 12, 1987, A-1165, A-1400, stated that "there is no legal basis to contractually relate [PetroEcuador] and TEXACO in respect to the joint operations in the Consortium." Resp. App. 19 (A-1173). The auditors recommended that the Minister of Energy and Mines "prepare the analysis and to decide ... the contractual relations that are necessary to be established between [PetroEcuador] and TEXACO."[5] *Id.*

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[5] Although, as noted by petitioners, the 1985 Audit Report listed the 1965 JOA as one of the documents that "governed" the "activities conducted by Texaco as Operator of the Consortium," Petition, p. 5, the same PetroEcuador auditor who had prepared the 1985 report deleted that language in the 1986 Report, apparently having become more familiar with the consortium's operations during the intervening year. A-

Likewise, PetroEcuador's 1986 Audit Report, a copy of which was provided to officers of the consortium in or about December 1987, A-1570, specifically stated that "*[d]ocuments such as the 'Napo Agreement' [1965 JOA] ... have remained up to date as referential instruments for the solution of difference[s] that may arise ... although the first has no legal argument to be binding upon*" PetroEcuador. Resp. App. 30-31 (A-1405) (emphasis added). This report additionally stated that "*there is no Agreement of Operation of [PetroEcuador] and Texaco*" and again recommended that such an agreement be negotiated. Resp. App. 31 (A-1406) (emphasis added).

On September 21, 1988, PetroEcuador provided written notice to Texaco that it would assume the role of Operator on July 1, 1990. A-1573. In preparation for that change, on June 30, 1990, PetroEcuador and Texaco entered into a new Change-of-Operator Agreement, which the parties expressly agreed was based only on the terms of the 1985 Agreement and PetroEcuador's September 21, 1988 notice. Although the Change-of-Operator Agreement purported to recite all its contractual antecedents, it contained no reference to the 1965 JOA. A-1373 ¶¶1.1-1.2; *see also* A-4596. Also, the "Jurisdiction" section of the Change-of-Operator Agreement provided that controversies between the parties arising from the Agreement "shall be brought before the [Ecuadorian] Special [Hydrocarbons] Court, in conformance

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1403-04. Of course, the word "governed" is also consistent with the 1965 JOA's use as a reference point for making *ad hoc* operational decisions.

with the Hydrocarbons Law and the regulations pertinent to the case." A-1378.

Pursuant to the Change-of-Operator Agreement, PetroEcuador assumed the role of Operator of the consortium in July 1990. On March 25, 1991, PetroEcuador and Texaco finally entered into a joint operating agreement (the "1991 JOA"), which was—as all JOA's to which PetroEcuador was a party had to be—duly recorded in the Hydrocarbons Registry on July 11, 1991. A-1580-602; Pet. App. 24a.

In June 1992, the 1973 Concession expired, and Texaco's interest in the consortium reverted to the Republic and PetroEcuador. A-916 ¶49.

The *Aguinda* Litigation. In November 1993, a group of residents of Ecuador's rain forest in the vicinity of the concession's operations filed a class action suit against Texaco in the United States District Court for the Southern District of New York, captioned *Aguinda v. Texaco, Inc. ("Aguinda").* The *Aguinda* plaintiffs "alleged that between 1964 and 1992, Texaco's oil operation activities polluted the rain forests and rivers in Ecuador." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002). The *Aguinda* plaintiffs sought money damages as well as "extensive equitable relief to redress contamination of the water supplies and environment." *Id.* at 473-74.

From 1993-2002, Texaco sought dismissal of the case in favor of an Ecuadorian forum. In 2002, the Second Circuit affirmed the district court's dismissal, principally on grounds of international comity and *forum non conveniens*, but with the understanding that the case would be re-filed and litigated in an Ecuadorian court. *Id.* at 476-78.

The 1994 MOU, 1995 Settlement Agreement, and 1998 Release. Late in 1994, the Republic, PetroEcuador and Texaco entered into a Memorandum of Understanding (the "1994 MOU") for Texaco's remediation of certain areas where it had operated the concession. The 1994 MOU was executed to settle any outstanding environmental remediation claims that the Republic or PetroEcuador (but not third parties) might have had against Texaco. Indeed, the 1994 MOU expressly provided that "[t]he provisions of this Memorandum of Understanding shall apply without prejudice to the rights possibly held *by third parties* for the impact caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium." Resp. App. 34 (A-1730) §VIII (emphasis added).

The next year, the Republic, PetroEcuador, and Texaco replaced the 1994 MOU with a more definitive agreement (the "1995 Settlement Agreement") to settle environmental damage claims that the Republic or PetroEcuador might have against Texaco arising from Texaco's role as consortium Operator. Pet. App. 10a.

Pursuant to the 1995 Settlement Agreement and a 1996 Remedial Action Plan adopted pursuant thereto (the "RAP"), Texaco and its contractors conducted certain remediation of the affected areas. The Republic, PetroEcuador and Texaco then executed a "Final Acta" (the "1998 Release"), releasing any contractual claims that the Republic and PetroEcuador might have had against Texaco for failure to perform its obligations under the 1995 Settlement Agreement. Pet. App. 10a. Being limited to the release of Texaco's contractual obligations to perform the RAP—

obligations owed exclusively to the Republic and PetroEcuador—the 1998 Release did not have to carve out third-party claims against Texaco.

The *Lago Agrio* Action. In 2003, virtually all the *Aguinda* plaintiffs re-filed their claims against Texaco in the Superior Court of Lago Agrio, Ecuador (the "*Lago Agrio*" action). As in *Aguinda*, the plaintiffs sought monetary damages as well as injunctive relief requiring Texaco to remove any polluting elements still in the region and to remediate the environmental damage allegedly caused by its years of negligence as Operator of the consortium. A-1805-31.[6]

The District Court's Order Granting A Permanent Stay of Arbitration. On June 19, 2007, after extensive briefing on the summary judgment motions, including supplemental submissions on Ecuadorian law and a four-day evidentiary hearing featuring expert testimony on Ecuadorian law held pursuant to Federal Rule of Civil Procedure 44.1, the district court issued the decision at issue here. That decision (1) granted respondents' re-

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[6] Although irrelevant to their petition, petitioners quote, out of context, an e-mail from Ecuador's Assistant Attorney General, which was copied to certain representatives of the *Lago Agrio* plaintiffs, and a March 2007 statement by the current president of Ecuador stating his support, in principle, for the *Lago Agrio* plaintiffs. Petition, p. 7. In fact, the e-mail concerned an unsuccessful effort by Texaco to have the then-Attorney General of Ecuador intervene in the *Lago Agrio* action on behalf of Texaco. A-4262; A-4691; A-4825-26. Both the then-Attorney General and subsequent Attorney Generals have declined to intervene in the *Lago Agrio* litigation on behalf of either party. And while the President of Ecuador has expressed support for the indigenous communities, he has not interfered with the legal process.

quest for a permanent injunction of the arbitration in New York that was initiated by petitioners (purportedly under the 1965 JOA), and (2) denied petitioners' motion for summary judgment on the permanent injunction. The court held "that an Ecuadorian court looking at the arbitration provision in the 1965 JOA would find it not binding upon PetroEcuador," and that "even in Chevron's [Texaco's] best case scenario, it still cannot show that under Ecuadorian law PetroEcuador would have the [1965] JOA enforced against it because there would be a lack of any reasonable expectation by Chevron that the [1965] JOA had continuing validity." Pet. App. 17a, 19a.

Additionally, the district court found that, "[b]ecause the formalities were not complied with, an Ecuadorian court looking back to 1974 would likely rule that the JOA was not binding on PetroEcuador"; that "[e]ven if formalities were not to be required in this instance, there is substantial disagreement amongst the experts as to whether the JOA, even if completely valid procedurally, would be constitutional"; and that "[t]he state of the law of Ecuador in 1974 on arbitral matters would be too unsettled for any reliance to be reasonably maintained." Pet. App. 24a, 28a-29a.

The district court rested its decision on the additional and alternative ground that "[t]he course of conduct of the parties ... becomes irrelevant if the party seeking to estop the government from denying the existence of a contract does not itself believe ... that the contract is binding on the government." Pet. App. 35a. The district court, citing substantial contemporaneous internal Texaco records, found that "[t]hat is the case here." *Id.*

Proceedings in the Court of Appeals. Petitioners appealed the district court's grant of a permanent injunction against arbitration to the United States Court of Appeals for the Second Circuit. In a summary order issued on October 7, 2008, the panel affirmed the district court's order, stating that "[w]e have considered all of Appellants' claims and, for substantially the reasons stated by the district court in its careful and well-reasoned decision, find them to be without merit." Pet. App. 2a. Petitioners' petition for rehearing or rehearing *en banc* was denied by the Court of Appeals on December 8, 2008. *Id.*, 132a-133a.

REASONS FOR DENYING THE PETITION

As the preceding history shows, petitioners could not possibly have had a reasonable expectation that PetroEcuador was bound by the 1965 JOA—which neither the Ecuadorian government nor any of its agencies ever signed or ratified—requiring arbitration in a foreign forum. Indeed, agreement with this provision would have been contrary to binding Ecuadorian law. This case is thus very different from *Hardie*, which involved the liability of the *United States* government pursuant to *United States* law. For that and other reasons explained in Section I below, the broad issue identified in the petition is not really presented under the facts of this case, and is not otherwise worthy of this Court's review. Moreover, as shown in Section II, petitioners have overlooked the interlocutory character of this case, and for that reason have vastly overstated the importance of the decision below. Finally, as shown in Section III, even if the question presented were truly presented here, and were otherwise worthy

of review, this case would be a poor vehicle with which to resolve that question.

I. The decision below did not create a circuit conflict on the question presented.

Petitioners err first in asserting that the Second Circuit's decision established principles of law in the Second Circuit which conflict with those of the Federal Circuit. The decision complained of is a summary affirmance, and thus according to the Second Circuit's Local Rules (32.1(b)), does not have precedential value in the Second Circuit. In any event, petitioners' articulation of the ruling below is much broader than the ruling itself. Finally, the decision below cannot conflict with the Federal Circuit's decision in *Hardie* because the latter considered estoppel only against the United States, whereas here the district and Circuit Courts considered estoppel against only the Republic, a *foreign* sovereign.

A. Even after summary affirmance, the district court's decision is not "Second Circuit law."

Local Rule 32.1 of the Second Circuit states that "Rulings by summary order do not have precedential effect." Instead of establishing precedent, summary orders are "abbreviated, and may omit material required to convey a complete accurate understanding of the disposition and/or the principles of law upon which it rests," and thus are only intended to provide "guidance and information" to the parties in cases where "each judge of the panel believes that no jurisprudential purpose would be served by an opinion." *See* 2d Cir. Local R. 32.1 cmt; 2d Cir. Local R. 32.1(a).

Petitioners themselves noted in their petition for rehearing *en banc* that the panel's summary affirmance permitted the court to avoid "adopting the district court's opinion as new Circuit precedent." Appellants' Petition for Rehearing and Rehearing en banc (Oct. 29, 2008) at 1. As such, the Second Circuit's summary affirmance does not establish "Second Circuit law" and therefore cannot possibly create an inter-circuit conflict.

That conclusion is buttressed by this Court's decision in *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), which discussed the purpose and scope of a summary affirmance. While "lower courts are bound by summary actions on the merits," "a summary affirmance is an affirmance of the judgment only." *Id.* Consequently, a summary affirmance fails to provide a basis on which to claim a circuit conflict necessitating review by this Court. *See also Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (a summary affirmance "is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.").

B. The district court did not even decide the question presented in the petition; it decided a much narrower issue that turns on Ecuadorian, not U.S. law.

Even if it constituted precedent of the Second Circuit, the decision below would not be worthy of review. Perhaps the most important reason is that the district court did not even attempt or purport to decide the general question presented in the petition, i.e., whether *as a general matter* "a government entity" is "bound by the arbitration provision in the joint operating agreement" when

it "steps into the shoes of a private party in a commercial joint venture and takes substantial and direct benefits under the venture's joint operating agreement. Pet. i. To be sure, petitioners argued in the district court that PetroEcuador is bound to the 1965 JOA both because (1) it "stepped into the shoes" (and thus implicitly "assumed" the obligations) of the previous concessionaires, Gulf and Texaco, and (2) PetroEcuador is allegedly "estopped" from denying obligations under the 1965 JOA—such as the obligation to waive the jurisdiction of Ecuadorian courts and arbitrate disputes in New York—because it allegedly knowingly accepted benefits under the 1965 JOA. Unlike the legal theories at issue in *Hardie,* both of these theories are impossible to analyze without reference to Ecuadorian law on which they turn.

1. With respect to their implicit "assumption" theory, petitioners previously complained that "the district court failed to address assumption" at all, Appellants' Petition for Rehearing and Rehearing en banc (Oct. 29, 2008) at 3, adding that the Court of Appeals' reliance on the district court's decision thereby made no sense. Silence, of course, cannot give rise to a circuit conflict.[7]

Nor could a conflict be divined in any event. To be bound to a contractual arbitration provision under an "assumption" theory, "a nonsignatory [of

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[7] Petitioners now claim that the district court collapsed assumption into estoppel. But as the district court observed, it was the parties themselves that "mesh[ed] categories 2 [assumption] and 5 [estoppel] of the Thomson-CSF analysis." Pet. App. 14a. The district court cannot be blamed for considering petitioners' argument as petitioners presented it.

the contract] must 'manifest[] a clear intent to arbitrate the dispute.'" *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991); *see also Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529, 532 (3d Cir. 2005). Here, PetroEcuador neither "expressly assumed" nor manifested a "clear intent" to be bound by any provision of the 1965 JOA. Under Ecuadorian law, PetroEcuador could manifest its intent to contract only in accordance with legal—and very transparent—public law requirements.[8] Here, the failure to obtain any of the necessary governmental approvals, or even a mere signature, establishes as a matter of Ecuadorian law the absence of any intent to contract. Neither *Hardie* nor any other appellate decision says anything to the contrary.

Nor is there any basis in contract to find that PetroEcuador agreed to assume the rights and obligations of the 1965 JOA. The parties agree that in the 1974 Agreement, PetroEcuador acquired a 25% interest in the 1973 Concession, not in the ancillary 1965 JOA. A-1912 ¶30 (PetroEcuador possessed an option "to acquire up to a 25% participation interest in the Napo Concession."); *id.* ¶32 (referring to PetroEcuador's "acquisition of a 25% interest in the Napo Concession"); A-1913 ¶35 (same). Petitioners' own expert conceded that "there is no statement anywhere in the 1974 Agreement that [PetroEcuador] will be [bound] to the privately negotiated JOA by and between Gulf and Texaco," and that there is no "reference to arbitration" at all in the document. A-5289.

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[8] A-498-503 ¶¶ 41-59; A-5068, 5069-70, A-5076; A-5080); *see also* Pet. App. 24a.

Although PetroEcuador later increased its interest in the 1973 Concession by purchasing "Gulf's remaining 37.5% share," nothing in the 1977 Purchase Agreement provides for PetroEcuador's assumption of obligations under the 1965 JOA. A-1917 ¶59. To the contrary, the *only* obligations PetroEcuador assumed were those "that are in accordance with th[is] agreement." A-1317 §2.13. As with the 1974 Agreement, the 1977 Agreement *did not even mention the 1965 JOA.*

Finally, respondents demonstrated in their summary judgment papers, and again at the Rule 44.1 Hearing, that PetroEcuador could not have lawfully become a party to the 1965 JOA because, among other things, under the Ecuadorian Constitution a State entity could not contract within Ecuador to resolve a dispute in an extraterritorial forum; the local courts had exclusive jurisdiction to resolve hydrocarbon contract disputes; no money had been appropriated to support the contract; the parties did not register the 1965 JOA in the Hydrocarbons Registry; the parties did not obtain the required approvals; and the contract was not signed by anyone on behalf of PetroEcuador.[9]

Petitioners suggest that none of this matters under the theory of "assumption" because, unlike estoppel, petitioners do not need to prove reliance. But petitioners ignore that their own expert testified that Texaco could not have made an end-run around Ecuador's extensive administrative and

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[9] A-496-99 ¶¶33-45, A-5067, A-5069-70, A-5076-77, A-5080; A-508-09 ¶¶83-89; A-4788-90 ¶¶17-20, A-5068, A-5080-81, A-5085-90, A-5093-94, A-5095-98, A-5101-02; A-490-91 ¶¶10-12, A-494-95 ¶¶25-26, A-500-05 ¶¶49-59, A-5068; A-503 ¶58, A-507 ¶78, A-5100; A-495-96 ¶¶27-32; A-5439-40.

public contract system of checks and balances so as to have bound PetroEcuador—through allegations of "implicit assumption" or otherwise—to any portion of the 1965 JOA. To the contrary, all pre-contracting requisites still had to be satisfied. A-5287-88; *see also* A-498 ¶ 40; A-5111. Given petitioners' expert's admission, it was eminently reasonable for the district court to reject summarily petitioners' "assumption" argument and focus instead on their "estoppel" argument.

Fundamentally, submission of a governmental entity to the 1965 JOA without the necessary public law approvals and in violation of the Ecuadorian Constitution would have created only an *illegal agreement*, void *ab initio*. Petitioners cite no case in which a court has ever enforced against a sovereign, either through the doctrine of implicit assumption or estoppel, what would otherwise be an *illegal* agreement. Enforcement of such an illegal contract against a nonsignatory, nonconsenting foreign sovereign in contravention of that nation's laws would be unprecedented. There is no inter-circuit conflict.

2. With respect to petitioners' theory of estoppel by acceptance of benefits, they have never denied their burden of establishing (a) "reasonable reliance" (b) on an *actual belief* that PetroEcuador was bound by the 1965 JOA. Indeed, they expressly acknowledged that burden in the proceedings below. Appellants' Brief (February 6, 2008) at 63-64.

As a matter of both United States and Ecuadorian law, Texaco's local Ecuadorian management and attorneys are presumed to have known Ecuadorian law, and consequently to have known that PetroEcuador could never have en-

tered into the 1965 JOA. *See, e.g.,* A-4794-95 ¶¶44-47; A-5275. As the district court found, the Ecuadorian Constitution prohibited submission of an organ of the State to a foreign jurisdiction. Pet. App. 25a. In addition to the constitutional bar, the court noted the "extensive formalities for entry into a government contract for the drilling of oil." Pet. App. 19a. None of the required formalities of public contracting law was satisfied. *Id.* Because Texaco is presumed to have known the law of public contracting, it could not have reasonably believed that PetroEcuador had become a party to, or was bound by, the 1965 JOA.

C. The District Court's decision, which addresses the use of estoppel against a foreign sovereign to compel an illegal act, does not conflict with the Federal Circuit's decision in *Hardie*.

When the district court's decision is properly understood, it is clear that it does not conflict with the Federal Circuit's decision in *Hardie*. The cornerstone of that decision is that, when the United States government stepped into the shoes of a private party, it was bound by *United States* "law applicable to contracts between private individuals." *Hardie v. United States*, 367 F.3d 1288, 1290-91 (Fed. Cir. 2004) (quoting *Hardie v. United States*, 19 Fed. Appx. 899 (Fed. Cir. 2001)). Only because the United States was treated as a private party did that court find that it was bound by the joint venture agreement (and the arbitration provision therein) presented in that case.

The underlying case here is materially different for many reasons. First, Ecuador is not the United States, and the domestic laws to which the federal Government is subject are quite different

from the foreign laws to which the Ecuadorian government, when acting wholly within its own country, is subject. Respondents offered substantial evidence at the Rule 44.1 Hearing that, under Ecuadorian law, PetroEcuador did *not* step into the shoes of (and *ipso facto* become) a private entity; it instead purchased a percentage interest in a partnership while maintaining its governmental status. A-5110-11, A5112-13; A-5287-88. Indeed, the notion that a State-owned oil company becomes a private party when it does precisely what it is chartered to do (acquire and participate in oil operations) makes no sense, Pet. App. 23a-24a, and turns on its head traditional judicial deference to the laws and rights of a foreign sovereign.

Second, no matter how otherwise characterized, Ecuador did not step into the shoes of a private entity as a result of criminal proceedings, as was the case in *Hardie*, but instead negotiated the purchase of an equity interest in the 1973 Concession from a willing seller by means of a government edict and a simple purchase agreement. To hold that this case is controlled by *Hardie* would be to hold that a sovereign agency, including an agency of a *foreign* sovereign, loses its governmental status any time it engages in a transaction with a private party.[10]

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[10] Petitioners erroneously rely on *United States v. Winstar*, 518 U.S. 839 (1996), to reach an opposite conclusion. But *Winstar* dealt with government actions that breached existing contracts. This Court simply did not consider any contention by the sovereign that there existed some legal impediment to it entering into the contracts at issue. Here, however, there was no breach of contract because, as discussed herein, the 1965 JOA was void *ab initio* with respect to Ecuador.

Third, petitioners struggle to find a colorable conflict between the Second Circuit and Federal Circuit principles of law regarding enforcement of a contract against a nonsignatory. Petition, p. 11. According to the petitioners, even though the court in *Hardie* was not faced with the question of binding a nonsignatory by estoppel, and therefore did not address estoppel, the *Hardie* decision is somehow in conflict with the Second Circuit's decision here. It is difficult to find a conflict worthy of *certiorari* when the two courts below have been faced with such different legal theories and factual scenarios.

II. The decision below is of far less importance than petitioners claim, both to the parties and to future disputes involving foreign governments and investment.

Petitioners paint a picture of "extraordinary government intervention and investment in private business" as the stage backdrop for their petition. But petitioners leave out of their portrait (a) the existence of alternative, pending claims, and (b) the improbable nature of this set of facts ever occurring again.

Petitioners have publicly stated that they face no imminent threat of having to satisfy any adverse judgment in the *Lago Agrio* action currently being litigated in Ecuador. First, that case has not yet been decided, so any potential liability is only theoretical at this juncture. Second, petitioners have the right to appeal any adverse decision, and have affirmed their intent to do so.[11] Third,

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[11] Randy Woods, *Ecuador is a headache for Chevron*, BUSINESS NEWS AMERICAS,

petitioners have also publicly announced their intention to challenge any final award in international arbitration as a violation of the U.S.-Ecuador Bilateral Investment Treaty.[12] Fourth, petitioners have publicly announced that they would challenge enforcement of any resulting Ecuadorian judgment in the Courts of the United States. Finally, as noted above, petitioners are seeking indemnification for any *Lago Agrio* liability through alternative theories of relief still pending before the district court in this action.

Petitioners are thus relegated to claiming that the parties tacitly agreed to be legally bound for almost 20 years by an unsigned, multi-billion dollar contract. To believe that a large multinational oil company, with sophisticated in-house and in-country counsel, would engage a foreign sovereign in a contractual business relationship covering more than 17 years, without ensuring that the contract on which it was purportedly relying had been signed, or even approved as valid, requires a significant stretch of the imagination. This is hardly the type of recurring fact pattern that warrants this Court's attention.

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http://www.atamericas.com/content_print.jsp?id=464010&idioma=1$sector=&type=QA (last visited April 24, 2008); Clare Bolton, *Rumble in the Jungle*, LATIN LAWYER ONLINE Mar. 28, 2008, https://www.chevron.com/documents/pdf/texacorumble.pdf (last visited May 18, 2009).

[12] *Id.*

III. Even if the question identified in the petition were really presented by this case, and were otherwise worthy of review, this case would be a poor vehicle for addressing it.

In any event, even if the issue presented in the petition were presented by this case and were otherwise worthy of this Court's attention, this case is not a good vehicle to address that question. First, as shown below, with respect to petitioners' estoppel theory, the district court's decision rests on an alternative, fact-bound holding, namely, that petitioners themselves admitted they did not believe the 1965 JOA was binding on PetroEcuador. Second, the district court's decision is interlocutory, and regardless of this Court's decision, leaves petitioners with alternative avenues for relief.

A. The district court's decision rests on an alternative fact-bound holding, unchallenged in the petition, that petitioners themselves did not believe the 1965 JOA was binding on PetroEcuador.

The district court based its decision on many holdings, including: (1) the status of Ecuadorian law at the time barring a sovereign's submission to extraterritorial arbitration, (2) the unlikelihood of an Ecuadorian court finding the 1965 JOA binding, and (3) that petitioners offered no evidence that they *actually* relied on the 1965 JOA.

The last point is especially important because it provides both an alternative ground for the district court's decision on petitioners' estoppel theory, and a powerful policy reason for denying any relief to petitioners. As the court put it,

> [E]ven if the Court held that an Ecuadorian court would find Chevron's interpretation of the laws of Ecuador correct, Chevron has proffered no evidence which shows that it *actually believed* the JOA bound CEPE at relevant times. Indeed, evidence to the contrary has been presented. Chevron's own expert states that this is fatal to any reasonable expectation claim (to the extent it exists) under Ecuadorian law.

App. 18a-19a. That is, even if the relevant law would *permit* petitioners to rely upon an estoppel theory in treating the 1965 JOA as binding on PetroEcuador, they still would not be entitled to relief because they have failed to establish any *actual* reliance on the JOA. This fact alone requires rejection of petitioners' argument on the merits, even if their underlying legal theory were correct.

This is also a powerful reason for denying review. If this Court were to hold for the first time that a foreign sovereign is subject to judicial estoppel or mandatory assumption under circumstances like those here, surely the Court would want to issue the holding in favor of someone who *actually* relied to its detriment upon the alleged legal materials.

As shown on pages 7-12 above, however, petitioners did not in fact rely—reasonably or even unreasonably—on the assumption that PetroEcuador was bound to the 1965 JOA. Texaco's own internal documents note that the consortium was working under a *de facto* arrangement, and that until a new joint operating agreement was signed, all Texaco could use was its own internal rules and procedures. Resp. App. 26 (A-1388); Resp. App. 28 (A-1391); Resp. App. 21 (A-1344). Gulf

similarly advised Texaco in numerous letters from June 1975 through November 1976 that the 1965 JOA had terminated the moment the 1973 Concession had replaced the 1964 Concession. Resp. App. 38 (A-4774) ¶10; Resp. App. 9 (A-1092); A-4777-81. These letters are in accord with PetroEcuador's Audit Reports from 1984 through 1986. Resp. App. 29 (A-1393); Resp. App. 19 (A-1173); Resp. App. 30-31 (A-1406); Resp. App. 32 (A-1409).

Subsequent agreements also make clear that the parties did not actually believe they were operating under the 1965 JOA. The 1977 Gulf Agreement contained no provisions requiring PetroEcuador to assume any obligations that Gulf owed to Texaco *under the 1965 JOA*. In fact, the 1977 Gulf Agreement referred to the 1973 Concession as the sole contractual basis for the relationship between the concessionaires. No mention was made of the 1965 JOA. Similarly, the 1985 Change-of-Operator Agreement did not recite the 1965 JOA as the basis for interim consortium operations, instead referring only to Texaco's historical "standards and procedures." Resp. App. 24 (A-1362) ¶ 3.3.2.

B. The district court's decision is interlocutory and still leaves petitioners with an opportunity for relief.

This case would not be a good vehicle for addressing any issue of interest to the Court for the additional reason that it is interlocutory in nature. As petitioners concede, both parties still have claims pending before the district court. Because petitioners continue to pursue alternative theories of indemnification, there is no reason for

this Court to take up the present fact-bound case to address the nonexistent circuit conflict imagined by petitioners.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

C. MACNEIL MITCHELL
Winston & Strawn LLP
200 Park Avenue
New York, NY 10166
(212) 294-6700

GENE C. SCHAERR
Counsel of Record
ERIC W. BLOOM
TOMAS LEONARD
NICOLE Y. SILVER
GREGORY L. EWING
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
(202) 282-5000

Counsel for Respondents

MAY 26, 2009

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE REPUBLIC OF ECUADOR et al.,	:	
Plaintiffs,	:	
v.	:	No. 04CV8378LBS
CHEVRONTEXACO CORPORATION et al.,	:	
Defendants.	:	

Washington, D.C.

Thursday, November 16, 2006

Deposition of

RODRIGO PEREZ PALLARES

* * *

[144] **Q Are you aware of anyone at Texaco ever reaching out to CEPE or subsequently Petroecuador in light of Gulf's position to confirm that CEPE, in fact, considered itself bound to the 1965 NAPO agreement?**

THE INTERPRETER: Of the '65?

BY MR. BLOOM:

Q Correct.

A The answer's no.

Q Now, would you agree that CEPE never actually signed the 1965 JOA? Is that correct?

A That CEPE saw?

Q No, never signed.

A It did not sign, did not sign, did not sign.

Q Did you personally ever have any conversations with anyone at CEPE specifically confirming that CEPE would agree to be bound to all of the terms of the 1965 NAPO agreement?

A No.

Q And I again don't want to invade attorney-client privilege, but in a nonprivileged setting did anyone at Texaco ever inform you of discussions that they may have had with CEPE or Petroecuador regarding the applicability of the NAPO agreement?

A No.

MR. KOLIS: Okay.

BY MR. BLOOM:

Q Is there a reason that you know – withdraw that.

Did Texaco ever consider having CEPE execute a writing that specifically confirmed its intent to be bound to all of the provisions of the NAPO agreement?

MR. KOLIS: I apologize, could you read it back?

(The reporter read the record as requested.)

MR. KOLIS: Let me just object. To the extent you can answer the question without revealing the – the contents of the communications you had internally with your client, confidential communications, you may do so.

THE WITNESS: Not that I'm aware of.

MINUTES

In accordance with the Supreme Decree No 09, dated January 2 of the year 1974, published in the Official Registry No 469, dated January 10 of the year 1974 that authorizes Mr. Minister of Energy and Natural Resources to negotiate for the acquisition of the 25% of the rights and assets of the Consortium Texaco-Gulf corresponding to the Agreement of Exploration and Exploitation of Hydrocarbons subscribed on August 6, 1973, and being the interest of the State that this option shall be effective on June 6, 1974, the following essential items of the negotiation were agreed to by the Ministry of Natural and Energy Resources, CEPE and the Companies Texaco Petroleum Company and Ecuadorian Gulf Oil Company, in the following essential items of the negotiation:

1. The participation of CEPE shall become effective at 00:01 hours of the sixth day of the month of June of the year 1974.

2. The terms and conditions of the purchase-sale shall be object of agreements between the parties in a participation agreement that shall be subject to the approval of the National Government.

* * *

8. All the activities to be performed in the Joint Operation shall be ruled by an Operation Agreement to be subscribed by the parties. CEPE shall participate in the Committee of Representatives of the Parties, and in permanent Sub Committees of

Engineering of Oil and of Accounting and Audit, as well as in other Sub Committees that the parties may approve.

* * *

In order to have a proof of what was agreed in the herein Minute, the parties sign this, in the city of Quito, on June 14, 1974.

[There follow four illegible signatures and below they read:] Gustavo Jarrín Ampudia, Ship Captain of E.M., MINISTRY OF ENERGY AND NATURAL RESOURCES – René Vargas Pazzos, Ternel. Eng. Of E.M., General Manager of CEPE – Eng. Bernardo J. Díaz, Manager, ECUADORIAN GULF OIL COMPANY – Michael A. Martínez, Manager, TEXACO PETROLEUM COMPANY

* * *

ATTACHMENT #1

PETROMAZONAS

When CEPE decided in 1974 to acquire 25% of the rights conferred to Texaco and Gulf by the 1973 Exploitation Contract, and of the assets acquired by the two companies for the purposes of the said Contract, both Texaco and Gulf recommended that a new Operating Agreement be negotiated and signed between CEPE TEXACO and GULF. As part of such Agreement the parties were suposed [sic] to designate an Operator. During the discussions CEPE made clear that neither Texaco nor Gulf would be the Operator, at which time the three parties agreed to form a new company to carry out the joint operations on behalf of them. A draft of the By-Laws was prepared and, together with the drafts of the Operating Agreement and the Participation Agreement, discussed with Gulf and CEPE at first, and with CEPE only later on, when Gulf sold their remaining interest in the Consortium to GULF. The latest draft was sent to CEPE in June, 1980. Since then we have not received any comments from CEPE, and neither Texaco nor CEPE have shown any interest in pursuing this project.

App. 7

Quito, July 14, 1977

PERSONAL AND
CONFIDENTIAL

CEPE AUDIT OF CONSORTIUM
REPORT DATED APRIL 6, 1977

Mr. A.S. Aldrich
Texaco Petroleum Co.
Coral Gables, Florida

Dear Sir:

Please find attached an English abstract of a Cepe (Corporación Estatal Petrolera Ecuatoriana) Audit Report of the consortium operating expenses booked during the period June 6, 1974 through December 31, 1976.

Section A attached is an abstract of the Audit Report; Section B is the Consortium's reply to Cepe.

The Audit consisted of 4 paragraphs on comments, adjustments, recommendations, etc.:

Audit Paragraph 2, General Comments

No answer required on our part.

* * *

Unless Cepe considers it necessary to review in further detail the Consortium's reply it is our position that no further action or reply is required and the audit review is closed.

Yours very truly,
M.A. Martinez, Manager

Original signed by
By: /s/ R. D. Hoggatt
R. D. Hoggatt

ATTACHMENT A

CEPE AUDIT REPORT

ENGLISH ABSTRACT

1. Scope of the Audit

This audit was conducted to examine the operating expenses booked during the period June 6, 1974 through December 31, 1976.

The work was performed by a team of 3 persons: 1 supervisor, Lcdo. Fasuto Villota C. and 2 auditors: Martha Granja C. and Susana Chacón V.

* * *

2. General Comments

a. The fact that an operating agreement between the consortium members Texaco, Gulf and CEPE had not been signed, therefore, Texaco which was the acting operator on June 6, 1974 continued in charge of the operations with the tacit agreement of CEPE and Gulf.

* * *

App. 9

Ecuadorian Gulf Oil Company

Quito, September 23, 1975

JCH-157

Mr. Michael A. Martinez
Manager
TEXACO PETROLEUM COMPANY
Quito

Dear Mr. Martinez:

We refer to your letter M-2052 of August 22, 1975.

We have noted again that you presume, erroneously, in our view, that the Napo Joint Operating Agreement, executed October 22, 1965, and the Coca Letter Agreement of August 8, 1970, are presently in force. We consider that these agreements terminated under their own terms as a result of, and effective upon, the execution of the Petroleum Exploration and Exploitation Contract of August 6, 1973 with the Government of Ecuador. As a consequence, the existing operations, including the handling of Cash Calls, are being pursued on a de facto basis until such time as the new operating agreement is finalized.

Please understand that any payments we make to you in response to Cash Calls, or otherwise, do not constitute our acceptance that the cited agreements

have been in force on any day subsequent to August 14, 1973.

Truly yours,

/s/ G. W. Hall
G. W. HALL

BM/cg

[LOGO]

(Received Apr. 29, 1976)

QUITO ECDR 04-27-76 GLU

TEXLAT CORAL GABLES RCS
RELAY COPY TO PE (EXP/PROD. – GULF) – Done – [/s/ LS]

EJT-106 (TAO B/MAM)

QQ

WE GREATLY CONCERNED AT LACK OF PROGRESS IN PRODUCING AGREED T/G DRAFT OF PARTICIPATION AGREEMENT. WE SUGGEST MAXIMUM PRIORITY THIS PROJECT FOR FOLLOWING REASONS:

1. THE ACTA OF 14 JUNE 1974 COMMITTED US TO A GENERAL COURSE OF ACTION TO BE FOLLOWED (PARAGRAPH 2) BY A PARTICIPATION AGREEMENT SPECIFYING THE PARTICULAR TERMS AND CONDITIONS OF THE SALE, AND THEREAFTER AN OPERATING AGREEMENT REGULATING JOINT OPERATIONS ACTIVITIES. IN THE ABSENCE OF THESE AGREEMENTS WE HAVE BEEN OPERATING ON AN AD HOC BASIS WHEREBY CEPE IS FREE TO PLACE WHATEVER INTERPRETATION IT LIKES ON THE ACTA AND EVERY PROBLEM ARISING THEREFROM BECOMES A MATTER FOR INTERMINABLE NEGOTIATION ON A PURELY INTERIM BASIS. (CURRENT PROBLEMS CONCERNING CRUDE NOMINATIONS, CASH CALLS, AND PERSONNEL ALL ARISE FROM THE LACK OF A FORMAL OPERATING STRUCTURE).

2. NOT WITHSTANDING PENDING AUDIT DETERMINATION OF REMAINING CEPE PAYMENT, IT IS UNLIKELY THAT CEPE WILL CONTRIBUTE THIS AMOUNT UNTIL PARTICIPATION AGREEMENT IS SIGNED.

YOUR ASSISTANCE IN EXPEDITING FINALIZATION OF PARTICIPATION AGREEMENT SO THAT WE CAN PRESENT TO CEPE WILL BE APPRECIATED. OK

O'BRIEN/MARTINEZ

NNN

[illegible]

Quito, June 10, 1974

M-1440/74

E. M. Lt. Col.
René Vargas P.
Manager, C.E.P.E.
His Office.

Dear Manager:

The 25% applicable to CEPE for the cash disbursement corresponding to June, 1974 was reported in our letter M-1314/74 of May 28, 1974.

For your information and consideration, the procedure applied by Texaco Petroleum Company and Ecuadorian Gulf Oil Company beginning in September 1972, to advance funds for the following month's estimated cash deposits, is as follows:

* * *

6. The adjustments required to offset the (over or under) estimates for funds advanced for a given month are made in the following month.

A penalty for default more than 30 days after the date on which the funds should have been furnished applies as between the parties (Texaco and Gulf).

* * *

For your information and review, enclosed please find a copy of the Funding Request for May, 1974, submitted to Ecuadorian Gulf Oil Company by Texaco Petroleum Company on April 18, 1974.

Sincerely yours,

[stamp:] ORIGINAL SIGNED
BY: M. A. Martinez

M. A. Martinez
Manager

[initials]
[illegible]: ylm.

Dec 17 3 03AH'75

2714 GULPE ED
60 GULF OIL CO-LATIN AMERICA CORAL GABLES FLA 12-17-75

GULFPRO
QUITO
LD-584 FOR LAFRANCONI

RE-NAPO ACCOUNTING PROCEDURES YOUR TX-092 LUCAS, O/BRIEN AND UNDERSIGNED AGREE TO FURNISHING COPY OF NAPO ACCOUNTING PROCEDURES TO PEAT MARWICK WITH MENION THAT GULF CONSIDERS NAPO JOINT OPERATING AGREEMENT TERMINATED AUGUST, 1973 AND THAT NAPO ACCOUNTING PROCEDURES ARE USED MERELY FOR QUOTE INTERIM GUIDANCE UNQUOTE REGARDS

WILCOX

2714 GULPE ED

PACK
CORRECTION THIRD LINE OF TEXT SHOULD READ

TOHPEAT MARWICK WITH MENTION REPEAT MENTION

2714 GULPE ED
GULF OIL CGBL

[TRANSLATION]

[At the foot the page is numbered:] 156

[A stamp appears at the right hand of the page] 024207

MEMORANDUM No. 979 A5-SCE-88

To: Mr. President and the Members of the Board of Directors

From: GENERAL MANAGER

Re: CEPE's Strategic Operating Plan in the CEPE-TEXACO Consortium

---

As from the creation of CEPE [the issue] related to its optimum development and self-determination as a State-owned company, responsible for the most important resource-generation activity in Ecuador, has been a permanent goal.

Accordingly only strategic planning will allow establishing the direction that CEPE must follow by means of the definition of its objectives and policies. CEPE's influence in the operations of the Consortium has not been fully in line with the existing oil policy definitions, in spite of the fact that the CEPE owns 62.50% of the rights and shares of the Consortium, on the contrary TEXACO being its actual operator holding a 37.50% interest. It should be noted that in the Trans-Ecuadorian Oil Pipeline CEPE and TEXACO are co-owners holding a 50% stake each.

It is considered that such circumstance results from the lack of an adequate legal instrument governing the relations of the co-owners and regulating the procedures of such operation, since the "NAPO AGREEMENT" and the Minutes of June 14, 1974, fixing CEPE's first interest percentage, are only referential documents for the solution of controversies that may arise.

* * *

In light of the above considerations I have decided by means of Memorandum No. [blurred] 801-CEPE-12-2011 of October 28, 1982, to up of an internal work group to design the strategy that must be adopted by CEPE within the next ten years, as majority shareholder of the CONSORTIUM, starting from a basic parameter: CEPE should be as from January 1, 1985 the actual Operator of the operations.

The referred work group has prepared the document "CEPE's Strategic Operating Plan in the CEPE-TEXACO Consortium" attached hereto, laying down the general objectives and policies that will be the basis to plan the actions to be taken for the performance thereof.

Therefore, I hereby request Mr. President and the Members of the Board to approve this document and specifically to adopt decisions on the following issues:

1. Inform in writing to Texaco Petroleum Company of CEPE's interest in undertaking the operations of the Consortium as from January 1, 1985.

2. Draft and negotiate the "Operating Agreement" with TEXACO PETROLEUM COMPANY. The purpose of such agreement will be to allow the parties to exercise their rights and obligations contained in the Exploration and Production Agreement of August 6, 1973, in an orderly and economic manner, and thus, vesting CEPE with the managerial capacity and power of decision at all levels as majority shareholder, and to provide the relevant legal support for the implementation of all the actions and resources that may lead CEPE to the performance of its purposes.

* * *

Yours sincerely,

GOD, COUNTRY AND FREEDOM

[signed]
Raul Jaramillo del Castillo
General Manager

[Illegible stamps follow]

HV/illegible

INTRODUCTORY INFORMATION

1. REASON OF THE EXAM

The Internal Audit Unit of CEPE in compliance with the Annual Plan of activities for 1986 provided for the performance of a special exam on the costs, expenses and investments made by Texaco operator of Consortium CEPE-TEXACO, in operation of Transecuadorian Pipeline in the period 1985, through the working order No. 007-AIN-86 of March 24, 1986.

* * *

CONCLUSIONS

Pursuant to what was stated, there is no legal basis to contractually relate CEPE and TEXACO in respect to the joint operations in the Consortium CEPE-TEXACO. This item was already revealed by the Internal Audit of CEPE in the report of the Special Exam corresponding to the period of 1984, since it is appreciated the difficulty to comply with one of the objectives of the Agreement, of creating the best conditions within which CEPE can undertake the operations of the Consortium at satisfactory levels.

RECOMMENDATIONS

1. To Mr. President of the Board of Directors, we herein recommend you as Minister of Energy and Mines, to prepare the analysis and to decide over the contractual relations that are necessary to be established between CEPE and TEXACO that will allow to rule over the activities, duties and rights in the joint

operations with the Consortium CEPE-TEXACO, as well as the definitions properly specified, when the contractual relation finishes.

* * *

[hw:] CEPE – Joint Operating Agreement

Quito,
December 30, 1976

MP-251/76-106.1

E.M. Col. Héctor Miranda
General Manager
CORPORACIÓN ESTATAL PETROLERA
ECUATORIANA (CEPE)
Addressed to his Office

Dear General Manager,

In view of the announced transfer of GULF's rights and shares listed in the Contract of August 6, 1975 in favor of CEPE, we believe that it is in the fundamental interest of the two remaining members of the Consortium, i.e. CEPE and TEXACO, to maintain the most efficient levels of production and to continue the operations, until such time when other agreements can be reached. To that end, we propose the following:

1. Until an agreement on new operating procedures can be reached, TEXACO PETROLEUM COMPANY shall continue to apply its own internal rules concerning the management, administration, and approval of outlays in all phases of the joint operations. TEXACO PETROLEUM COMPANY shall continue to keep CEPE informed, as it has been doing, and it shall obtain CEPE's consent for all actions and outlays of major importance.

* * *

Yours sincerely,

ORIGINAL SIGNED BY: M.A. Martínez
M.A. Martínez

JMQ/mcd

AGREEMENT BY THE ECUADORIAN STATE PETROLEUM CORPORATION (CEPE) AND TEXACO PETROLEUM COMPANY CONCERNING THE CEPE-TEXACO CONSORTIUM OPERATIONS:

1. BACKGROUND:

* * *

1.11 CEPE's Board of Directors, at its meeting held on December 27, 1984, resolved;

"1. To reaffirm CEPE's right as majority partner in the CEPE-Texaco Consortium to take over the operations at the most timely moment, that is, when legal and other administrative and operating conditions can permit CEPE's efficient operation of the Consortium. One year written notice of this decision shall be given to the Consortium Operator.

2. To authorize CEPE's General Manager to negotiate and execute an agreement with Texaco Petroleum Company's Manager containing basically the foregoing.

3. To authorize CEPE's General Manager to proceed to negotiate a joint operations agreement with the Consortium within 30 days following the effective date of the aforementioned agreement.

4. To maintain the Consortium's current operating system until the aforementioned agreement is signed."

2. OBJECTIVES OF THE AGREEMENT

With the above background, the parties have agreed to the following:

2.1 The parties hereby reaffirm CEPE's right as majority partner to take over the Consortium's operations, and declare that in order that CEPE may exercise this right at a timely moment and with optimal conditions guaranteeing that the country's most important activity for national-development, that is, petroleum exploitation, shall be carried out within a framework of strict efficiency, regularity and stability, it is necessary to take the appropriate steps for such conditions to occur,

* * *

3. CONCLUSIONS

* * *

3.3 In the meantime, and in order to prepare the Corporation and its personnel gradually by providing the necessary technical and operating capabilities to take over such important and complex operations, the parties specifically agree to the following:

3.3.1 The parties shall within 30 days commence negotiations for a final Joint Operations Agreement to continue the Consortium's operations.

3.3.2 Until the Joint Operations Agreement becomes effective, the Consortium's operations shall be carried out according to the standards and procedures that have been in force up to now.

* * *

In witness whereof, the parties have signed this agreement in Quito on January 22, 1985.

General (r) Sólon A. Espinosa	Donald G. Sawyer
General Manager	Manager
Ecuadorian State Petroleum Corporation	Texaco-Petroleum Company

[TRANSLATION]

Quito,
March 4, 1983

MP-110/83

To:
Rear Admiral Raúl Jaramillo del Castillo
General Manager
CEPE

Dear Sir,

We acknowledge receipt of your kind Official Notice No. 855-DT-SCE-82-013171 dated December 30, 1982, by which you notify TEXACO of CEPE's desire to assume the duties of Operator of the CEPE-TEXACO Consortium as of January 1, 1985.

The said notice, issued under Section 6 of the Joint Operations Agreement signed between TEXACO and GULF in October 1965, and never formally adopted by CEPE, is of great significance towards the efficient and continuous progress of the operation. Therefore, we deem it highly important that the subject matter of the notice be discussed by both parties in order to guarantee that any agreement relative to the operation of the activities of the Consortium be as convenient as possible to the interests of the co-owners and of the Federal Government.

In light of the above, we request that you indicate the time and place for representatives from both companies to initiate talks on this matter of significance.

Sincerely,

[Signature]
W.C. Benton
Manager

PRIVATE

MEETING WITH THE MINISTER OF NATURAL RESOURCES, GEN. E. SEMBLANTES
TUESDAY, AUGUST 22, 1978 (12:30-12:50 PM)

The following main points were discussed with the Minister:

1. OPCA: The Minister was advised of the status of the OPCA negotiation and that all pertinent documents were in CEPE's hands. He was also told that we are now working under a de-facto OPCA arrangement.

/s/ [Illegible]
R. Bucaram

RB:snd
cc: Mr. R.M. Bischoff

* * *

Quito, December 9, 1996

TEXACO'S COMMENTS TO THE OFFICIAL LETTER No. 1092-AIN-86-13183 DATED NOVEMBER 26, 1986 [ITEM 3]

1. In the first paragraph, CEPE's General Auditor refers to a breach of Art. B, item 8 of the Napo Joint Operating Agreement. As set forth in the report of the special examination of operating expenses and investment of the CEPE-TEXACO Consortium for the year 1984, on page 1, recommendation No. 1, there is no Joint Operating Agreement between CEPE and TEXACO that has been declared to be valid and effective by the parties; we do not agree with the comments made by CEPE's Auditors. Therefore, no reference to the Napo Joint Operating Agreement would be applicable since, according to CEPE, it is not in effect.

In addition to the foregoing, we must point out that the regulations concerning the cash calls have been clearly set forth and communicated to CEPE in letter M-1440/40 dated June 10, 1974, a copy of which is hereunto annexed, which is self explanatory.

* * *

Introductory Information

1. Reason of the study

The special study to Expenses of Operation and Investment in Production of the CEPE-TEXACO Consortium corresponding to the year 1986 was performed in compliance with the Annual Plan of Activities for 1987 of the Internal Audit Unit of CEPE, with the issuance of the Work Order No. 002-AIN-87 of January 22nd 1987.

* * *

1.2 By memorandum No. 801-SCE-82-20138 of October 28th 1982, the General Manager of CEPE appointed a commission for the design of the strategy to be adopted by CEPE during the next 10 years, as majority shareholder of the CEPE-TEXACO Consortium, being elaborated the "Strategic-Operative Plan of CEPE in the CEPE-TEXACO Consortium".

In this document the following considerations are expressed:

"It must be established that practically from the beginning of the exploration until the production stage, the real operator of the fields has been the Texaco Company with certain engineering of Gulf in the first years and of CEPE in the last years.

Documents, such as the "Napo Agreement" and the Minutes of June 14th 1974 stating the percentage of CEPE's sharing, have remained up to date as referential instruments for the solution of the difference that may

arise out, although the first has no legal argument to be binding upon the Corporation, except as otherwise provided.

In fact, CEPE did not have an engineering of greater importance in the operation of the Consortium, which did not correspond exactly with the definitions of the existing oil policies; this occurs mainly due to the absence of a legal document governing the relation between co-owners and for the adoption of procedures to regulate such operation.

* * *

The Commission concluded as follows: there is no Agreement of Operation of CEPE and Texaco, and the implementation thereof; CEPE suggested training the personnel on technical, operative and administrative issues to assume directly the whole operation of the consortium, but during 1980 withdrew personnel leaving only the 4.7% of the total; the procedure of approval of co-owner to the management in charge of the operator did not allow CEPE to apply its policies within the Consortium due to the absence of implementation of the Agreement of Joint Operations, and the incorporation and operation of the corresponding Committees and Sub-Committees.

Therefore, the Commission recommended the elaboration of an Agreement of Joint Operations regulating the totality of the activities to be developed in the joint operation, that CEPE assume the responsibility for the administration and operation of the Consortium

gradually, and to progressively replace the foreign personnel by national personnel.

* * *

3.1 Preparation, submitting and approval

TEXACO Petroleum Company, Operator of the CEPE-TEXACO consortium, has not submitted, as of September 1st of each year, the Work Program and its budgets to the members of CEPE and TEXACO, according to Art. 82 of the Napo Agreement of Joint Operations which states the referential terms for the joint operation between CEPE and TEXACO.

* * *

REPUBLIC OF ECUADOR
MINISTRY OF ENERGY AND MINES

MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF ECUADOR, PETROECUADOR AND TEXACO PETROLEUM COMPANY

This Memorandum of Understanding is made and entered into by the Government of Ecuador, through the Ministry of Energy and Mines, legally represented by the Minister, Eng. Gustavo Galindo Velasco, hereinafter the "Ministry," and the state company Petróleos de Ecuador, PETROECUADOR, legally represented by its Executive President, Dr. Federico Vintimilla Salcedo, hereinafter "PETROECUADOR," as party of the first part; and by Texaco Petroleum Company, a Delaware corporation with offices at Av. 6 de Diciembre 2816 and J. Orton, Quito, legally represented by its Legal Representative in Ecuador, Mr. Rodrigo Pérez Pallares, and by Dr. Ricardo Reis Veiga, in his capacity of Vice President thereof, hereinafter "Texpet," as party of the second part.

I. OBJECTIVES

The objectives of this Memorandum of Understanding are the following:

a) To set out the scope of the environmental remedial work to be conducted in the area of the former PETROECUADOR-TEXACO Consortium, concerning the biotic, abiotic, and socioeconomic aspects, which scope shall constitute the basis on which Texpet shall issue the corresponding request for bids;

* * *

VIII. The provisions of this Memorandum of Understanding shall apply without prejudice to the rights possibly held by third parties for the impact caused as a consequence of the operations of the former PETROECUADOR-TEXACO Consortium.

In witness whereof the Parties accept the provisions set forth above, and sign this Memorandum of Understanding in Quito, on Dec. 14, 1994.

Eng. Gustavo Galindo Velasco
MINISTER OF ENERGY AND MINES

Dr. Federico Vintimilla Salcedo
EXECUTIVE PRESIDENT OF PETROECUADOR

Dr. Rodrigo Pérez Pallares
LEGAL REPRESENTATIVE OF TEXACO PETROLEUM COMPANY

Dr. Ricardo Reis Veiga
VICE PRESIDENT OF TEXACO PETROLEUM COMPANY

DIR. LEG. CONS. DR. MPE
JSM/
CFS/NCG
December 14, 94

App. 35

TEXACO PETROLEUM COMPANY

PROPRIETARY OFFICE

AVDA: AMAZONA 662 50 Piso
TELEFONO: 544-738
APARTADO POSTAL: 6 A
TELEX: 2725
QUITO: Ecuador, S. A.

July 11, 1979

INTERNAL AUDITS – CONSORTIUM

PRIVATE

MEMORANDUM

Mr. W. C. Benton
Office

In accordance with your request, I have reviewed the letter dated July 6, 1979 from Consortium Management, together with its attachments which consist principally of a new internal audit program covering investment, costs and internal controls.

My observations on the matter are as follows:

* * *

3) *New Audit Program – potential disadvantages to Texaco.*

   i) Tone of new audit program implies a review of Consortium operations, as managed by de facto operator Texaco, from the standpoint of protecting interests of CEPE and the Ecuadorian Government and their respective officials. This is quite different from independent reviews of operational areas

scheduled in original internal audit plan for 1979. It may be assumed that most audit findings under the new program would tend to favor CEPE's interests at the expense of Texaco.

* * *

I believe we should:

i) Protest this major deviation from the original 1979 audit schedule, and ask when originally planned audits will take place.

ii) Deal promptly and firmly with every audit finding as it arises, strongly defending Texaco's interest at all times.

/s/ [Illegible]
A. C. Bedford

ACB:mmc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE REPUBLIC OF ECUADOR and PETROECUADOR,	:	04 Civ. 8378 (LBS)
	:	ECF CASE
Plaintiffs, Counterclaim Defendants,	:	
-against-	:	
CHEVRONTEXACO CORPORATION and TEXACO PETROLEUM COMPANY,	:	
Defendants, Counterclaim Plaintiffs.	:	

DECLARATION OF JUAN CHACIN GUZMAN

I, Juan Chacin Guzman, under penalty of perjury, do hereby declare pursuant to the laws of the United States of America, including 28 U.S.C. § 1746, that the following is true and correct:

* * *

III. CONSORTIUM OPERATIONS UNDER THE 1973 CONCESSION

9. From the moment the original Concession (the 1964 Concession) had terminated with the signing of the Petroleum Exploration and Exploitation Contract of August 6, 1973 with the Government of Ecuador and the 1973 Concession had become effective, Gulf believed that all agreements based upon and ancillary to the 1964 Concession had likewise

been terminated. This was not only my opinion, but also that held by senior Latin American stateside Gulf management in Coral Gables, Florida, as expressed to me. As President of Ecuadorian Gulf Oil beginning in early 1975, I communicated to Texaco Gulf's view that the original Concession and 1965 JOA had terminated upon the signing of the 1973 Concession.

10. Attached as Exhibits 1-5 of this declaration are letters prepared, executed and sent by me to Texaco (Official Letters Nos. JCH-78; JCH-93; JCH-125; JCH-182; JCH-217) dated, respectively, June 20, July 28, August 27, November 25 and October 20, 1975. In each case, in consultation with and having the support, approval and direction of senior stateside Gulf Latin American management, I (on behalf of Gulf) told Texaco that the 1965 JOA had terminated under its own terms "as a result of, and effective upon, the execution of the Petroleum Exploration and Exploitation Contract of August 6, 1973 with the Government of Ecuador." These letters reflected my then belief – which is also my current belief – that the 1965 JOA no longer bound Texaco and Gulf, much less CEPE, once the 1973 agreement had been executed.

11. I sent each letter to make clear to Texaco Gulf's position with respect to cash call procedures – namely, that Gulf's willingness to make the "cash call" payments was not derived from any residual obligation that Gulf had to the Operator under the terminated 1965 JOA, but rather derived from our

mutual desire to continue performing the necessary operational activities in the interim until a new joint operating agreement – this one to include CEPE – could be negotiated.

12. Consistent with the above, to the best of my recollection, CEPE was never asked by Gulf to "join" the 1965 JOA. To the contrary, Gulf had always believed that since 1973 the 1965 JOA was no longer in force, even bilaterally as between Texaco and Gulf, much less between CEPE, Texaco and Gulf, and both companies therefore sought to negotiate a new tripartite operating agreement among CEPE, Texaco and Gulf. Gulf expressed to Texaco its discontent with continuing to operate indefinitely as concessionaires on a *de facto* interim basis in the absence of a legally enforceable joint operating agreement.

13. Attached to this declaration as Exhibits 6 and 7, respectively; is a January 25, 1975 letter to me from Rene Vargas Pazzos, CEPE's General Manger [sic]; and a January 28 1975 letter sent by me to Rene Vargas Pazzos (Official Letter No. 015-75-DP-398 and letter JCH-05).

14. In the first letter, Mr. Vargas Pazzos states that CEPE has prepared a draft of a "Participation Contract for the Exploitation of Petroleum and Free Gas, and Joint Operations Agreement" for the contractual area. He goes on to state that these contracts were needed to govern the current and future relations of the CEPE, Texaco and Gulf Consortium. As Gulf's chief representative and ultimate authority in

Ecuador, I understood that a new joint operations agreement was needed because Gulf viewed the 1965 JOA as of historical interest only. In this letter, CEPE agreed that adopting an enforceable operating agreement would be quite desirable.

* * *

16. Finally, attached as Exhibits 8 and 9 of this declaration, respectively, is an April 1, 1975 letter from M.A. Martinez. General Manager of Texaco, to Rene Vargas Pazzos, CEPE's General Manger [sic]; and a July 16, 1975 telex from Rene Vargas Pazzos of CEPE to M.A. Martinez of Texaco and myself. In these letters as well, all three 1973 Consortium parties agreed on the need to finalize and execute a joint operating agreement among themselves. I am confident that in 1975 Texaco as well understood that the 1965 JOA was no longer an effective contract – not even bilaterally between Gulf and Texaco.

17. These facts and beliefs are based on my personal experience as President of Ecuadorian Gulf Oil Company and my observations of and dealings with the other Consortium members. All the documents referenced above, which I identify as business records of Gulf, correctly express the facts, practices and behavior of the Consortium members during the time that I acted as President of Gulf.

Executed: February 5th, 2007

By: /s/ Juan Chacin

TRANSLATION

(CEPE)

Official Letter No. 015-75-DP-398

Quito, January 25, 1975

Mr. Juan Chacin
General Manager
Ecuadorian Gulf Oil Company
Quito.

(Received Feb. 3, 1975)

Mr. Manager:

This Corporation has prepared the drafts of a PARTICIPATION CONTRACT FOR EXPLOITATION OF PETROLEUM AND FREE GAS and JOINT OPERATORS AGREEMENT – CONTRACT AREA. These documents shall govern the contractual and operational relations of the CEPE-TEXACO-GULF Consortium. I am enclosing copies of these drafts for your consideration.

CEPE is interested that at your earliest possible convenience you analyze the documents in order to enforce them immediately; I would therefore thank you very much if you contact the undersigned in order to establish the modus operandi to be followed.

Very truly yours,
RENE VARGAS PAZZOS
CEPE GENERAL MANAGER

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SUPREME COURT, U.S.

No. 08-1123

IN THE

Supreme Court of the United States

CHEVRONTEXACO CORPORATION AND
TEXACO PETROLEUM COMPANY,

Petitioners,

v.

REPUBLIC OF ECUADOR AND PETROECUADOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY FOR PETITIONERS

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REPLY FOR PETITIONERS

The petition identifies a circuit split on an important question: Whether federal common law binds a government entity to an arbitration provision in a commercial joint venture's operating agreement where the government entity steps into the shoes of a private party in the venture and takes direct and substantial benefits under the agreement. The government entity *is* bound to arbitrate in the Federal Circuit yet is *not* bound to arbitrate in the Second Circuit.

The fact that the Federal Circuit case involved the U.S. Government, while the decision below involved a foreign government, was affirmatively noted in the petition to underscore the absurdity of having the U.S. Government be the *only* government bound by its conduct. Yet respondents' brief *embraces* this double standard as distinguishing the law in the Federal and Second Circuits. Without citing any authority, respondents advocate immunizing foreign governments—but not the U.S. Government—from the federal common law rules for binding nonsignatories to contractual arbitration clauses through assumption and estoppel. To be bound by an arbitration clause, respondents argue, a foreign government must not only sign the contract but also fulfill any special requirements for government contracting under local law.

Neither Federal Circuit law nor Second Circuit law draws such a distinction between domestic and foreign governments. And respondents provide no reason why federal common law should be bifurcated to allow foreign governments, but not the U.S. Government, to use government contracting rules to

avoid the obligations of agreements under which they have operated and taken benefits. Respondents' position reinforces the need for this Court's guidance on the proper application of federal common law to government entities—both domestic and foreign—in this era of increasing public-private commercial ventures.

Unable to refute the existence of the circuit conflict, respondents devote half of their opposition to a factual counter-statement, claiming the case is a poor vehicle because, at the very outset of the relationship, there was uncertainty whether Petroecuador was bound by the 1965 Joint Operating Agreement ("JOA"). But both Texaco Petroleum Company ("TexPet") and Petroecuador adhered to the JOA throughout the Consortium, and, when an anticipated new joint operating agreement did not materialize, TexPet reasonably understood that the JOA would continue to govern the operations of the parties' commercial venture. The only alternative scenario—that *no* operating agreement governed the massive oil operation co-owned by the parties for seventeen years—is both facially implausible and contradicted by the evidence. Indeed, respondents nowhere dispute that they took direct and substantial benefits under the JOA—the same contract that they now disavow.

I. RESPONDENTS CANNOT AVOID THE CONFLICT WITH *HARDIE* AND WITH SETTLED PRINCIPLES OF ASSUMPTION AND ESTOPPEL

Respondents fail to distinguish *Hardie v. United States*, 367 F.3d 1288 (Fed. Cir. 2004), which enforced an arbitration clause against the U.S. Government based on conduct remarkably similar to Petroecuador's conduct here. In both cases, a government took a share of a commercial joint venture previously formed by private parties, operated for years under the original joint-venture agreement, and then denied any obligations (including the obligation to arbitrate disputes) under the agreement. Pet. 11-15.

The only factual difference alleged by respondents is that Petroecuador purchased its joint-venture interest whereas the Government in *Hardie* obtained its interest through forfeiture. Opp. 25. But the Federal Circuit stated that the case for binding the Government to the joint-venture agreement would have been equally strong if one of the original parties "had simply sold its interest in the ... joint venture outright to the United States." *Hardie v. United States*, 19 F. App'x 899, 905 (Fed. Cir. 2001). Thus, it made no "difference that the United States happened to obtain its 'interest' ... through forfeiture, as opposed to any other means." *Id.*

Unable to distinguish *Hardie* factually, respondents revert to the merits of their position, arguing that there could be no valid consent to the JOA absent compliance with special rules for government contracts. But this is nonresponsive. The issue is whether these Ecuadorian law defenses

are even relevant in light of Petroecuador's conduct under the JOA. Under Second Circuit law, special rules for government contracts are *dispositive*: If such rules prevent enforcement of a contract *qua* contract—indeed, if there merely is uncertainty on this score—then there can be no reasonable reliance and the government cannot be held to the contract. Pet. App. 18a-19a. Under Federal Circuit law, by contrast, the same government contracting rules are *irrelevant*: The government "assume[s] the obligations of [an] original party" when the government acquires that party's interest and continues to conduct business under the contract, *regardless* whether special government contracting rules are satisfied. 367 F.3d at 1289-91. Respondents do not dispute the soundness of the Federal Circuit's holding, or the underlying principle that government entities may be treated like private parties in a variety of circumstances, including with respect to the application of equitable doctrines. Pet. 17-18; *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) ("[T]he same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."); *Simon v. Rep. of Iraq*, 529 F.3d 1187, 1195 (D.C. Cir. 2008) (holding that common law principles of equitable tolling also apply to suits against foreign governments), *rev'd on other grounds sub nom. Rep. of Iraq v. Beaty*, Nos. 07-1090, 08-539 (U.S. June 8, 2009); *cf. Beaty*, slip op. at 16 (noting that equitable tolling would have applied to suit against foreign government if jurisdiction had existed). Yet respondents fail to address this circuit conflict at all.

In particular, notwithstanding respondents' vague assertion that "the domestic laws to which the federal Government is subject are quite different from the foreign laws to which the Ecuadorian government ... is subject" (Opp. 24-25), they identify no pertinent difference between the government contracting rules that they invoke and those that the Government invoked in *Hardie*. The Government resisted enforcement of the contract in *Hardie* just as respondents do here, arguing that strict compliance with government contracting rules was required to waive its sovereign immunity. *See* Petition For Rehearing *En Banc* at 14, 2004 WL 3769713 (arguing that court could not "*imply* a waiver of sovereign immunity" and that contract was invalid because of noncompliance with statutory requirement that there "be a ceiling in any arbitration agreement"); Supplemental Brief at 7, 2003 WL 24305640 ("Plaintiffs' demand for binding AAA arbitration is in direct conflict with the statutory limitations upon the use of binding arbitration by Federal agencies."). Accordingly, if the JOA were somehow an "*illegal agreement*, void *ab initio*" (Opp. 23), it was no more "illegal" than the agreement upheld in *Hardie*.[1] And if Petroecuador's noncompliance with government contracting requirements established "the absence of any intent to contract" (Opp. 21), then such intent was equally absent in *Hardie*. Without a doubt, even if the Government in *Hardie* had invoked the same contracting rules that respondents invoke here, the

[1] Contrary to respondents' suggestion, the district court did not decide whether the Ecuadorian legal requirements invoked by respondents actually applied to contracts like the JOA. The court concluded only that Ecuadorian law on these matters was "unsettled in 1974." Pet. App. 18a.

Federal Circuit still would have held that the Government was bound to arbitrate because its conduct rendered those rules irrelevant.

Respondents' proposed distinction between contracting defenses under U.S. and foreign law would also eliminate the uniformity and clarity provided by federal common law. Although respondents misleadingly indicate that this dispute was resolved under "binding Ecuadorian law" (Opp. 17), the fact is that federal common law was applied—at the urging of *respondents*—to avoid the confusion and inconsistency that would result from applying different rules to different governments. Pet. App. 14a, 71a n.15, 79a. To the extent respondents now seek to override federal common law and use Ecuadorian law to exempt Petroecuador from assumption and estoppel, the argument is forfeited. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

Respondents are thus left with the bare fact that *Hardie* involved the U.S. Government as opposed to the Ecuadorian Government. Opp. 24-25. Although that distinction—readily acknowledged in the petition (pp. 15-16, 24)—may explain why one case was filed in the Federal Circuit and the other in the Second Circuit, it does not explain the different results. Respondents provide no basis—and there is none—for a distinction under which foreign governments can use government contracting rules to avoid the application of assumption and estoppel while the U.S. Government cannot. Furthermore, there is no indication that *Hardie* would have turned out differently had it involved the Ecuadorian Government, or that this case would have turned out

differently below had it involved the U.S. Government. And even if Second Circuit law embraces a *sub silentio* distinction between foreign and domestic government entities, the result—that ours is the only government on the planet subject to assumption and estoppel—further strengthens the case for review.

Respondents' other attempts to avoid the conflict with *Hardie* are unavailing:

First, the conflict is not alleviated by the fact that assumption and estoppel are "'mesh[ed]'" under Second Circuit law as it now stands. Opp. 20 n.7 (quoting Pet. App. 14a).[2] Whereas the Second Circuit now makes estoppel's "reliance" requirement a necessary element of assumption as well, *Hardie* applied assumption with no such requirement. Respondents do not even attempt to defend the merging of assumption and estoppel in the Second Circuit, and, just this Term, this Court reiterated that they are distinct doctrines. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1902 (2009) (quoting 21 R. Lord, *Williston on Contracts* § 57:19, at 183 (4th ed. 2001)).

Second, the finding of no "actual" reliance—erroneously described by respondents as an "alternative ... holding"—is relevant only to the "estoppel theory" (Opp. 28) and does not affect assumption, which has no reliance requirement. This finding thus provides no basis for denying review of

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[2] Contrary to respondents' contention (Opp. 20 n.7), petitioners are not responsible for the erroneous meshing of the assumption and estoppel analyses. In both the district court and the Second Circuit, petitioners argued assumption as an independent basis for holding respondents to the JOA. (*E.g.*, A-1879-1900.)

the split with *Hardie*. Furthermore, despite respondents' effort to paint it as "fact-bound" (Opp. 28), the no-reliance finding rests on an important legal ruling that is plainly unsound.

The no-reliance finding was premised on the notion that, if a party *initially* is uncertain whether a nonsignatory is bound to a contract, then the nonsignatory's *subsequent* conduct indicating its acceptance of the contract is "irrelevant," and the nonsignatory *never* can be estopped from denying contractual obligations. Pet. App. 35a. This holding is untenable because, in all cases where a formal contract is absent, ambiguity may exist *before* a party engages in conduct that provides a basis for estoppel. Pet. 18-19. Properly understood, the issue is not whether one party believes that the other has no possible legal defenses, but whether it believes that the contract will be respected *notwithstanding* those defenses. *See, e.g., Wiggins Ferry Co. v. Ohio & Miss. Ry.*, 142 U.S. 396, 408-09 (1892) (although defendant was initially "at liberty to renounce" its predecessor's contract, it "sustained the same relation as had previously existed under the deed" and thus was "not ... permitted afterwards to repudiate any of its obligations"). The approach taken below eviscerates estoppel doctrine and heightens the need for review.

This case illustrates the capriciousness of this estoppel analysis. The evidence cited by the district court, and repeated in respondents' prolix background section (Opp. 4-13), establishes that, while the parties were unsuccessfully negotiating the terms of a new joint operating agreement, TexPet was aware that Petroecuador had not formally

adopted the JOA and complained about the *ad hoc* nature of the situation. Pet. App. 7a-9a, 31a-33a. But the evidence is clear that this uncertainty over the JOA did not extend beyond the early stages of the parties' relationship since, on the ground, Petroecuador was adhering to the JOA and continued to do so for *seventeen years*. Pet. 4-6. Importantly, respondents do not dispute the evidence that Petroecuador acknowledged and claimed the benefits of the JOA throughout the Consortium. They do not, for example, deny that Petroecuador "'refuse[d] to accept th[e] possibility'" that the JOA was not in force after it had invoked the contract's change-of-operator provision. Pet. 5-6 (quoting A-1392). To have conducted this major oil venture in a vacuum without reference to the terms of the JOA, furthermore, would have deviated sharply from standard industry practice. (A-2000-01.)

Respondents are thus reduced to arguing, without support, that the parties were "merely 'referen[cing]'" the JOA and did not consider it binding. Opp. 9. But the Government made the same argument in *Hardie*, to no avail. Petition for Panel Rehearing at 13-14, 2001 WL 34711631 ("[t]he fact that the United States ... looked to [the joint-venture] agreement[ ] to define the Government's interest ... does not suggest that ... [the] United States ... considered [itself] to be contractually bound"). Here, the "references" to the JOA signaled Petroecuador's adherence to the contract notwithstanding any legal defenses, and TexPet reasonably relied on those "references" in allowing Petroecuador to take the contract's benefits. Indeed, the district court previously viewed these "references" as sufficient to preclude summary judgment. Pet. App. 81a. A key component of the

question presented is whether the district court erred in later reversing course and deeming these "references" legally "irrelevant." Pet. App. 35a.

Third, the Second Circuit's use of the summary-order mechanism is not a basis for avoiding either the existence of a circuit split or the need for this Court's review. To be sure, binding Second Circuit law could not properly have been established in a summary order. Opp. 18-19. But respondents ignore that the summary order also could not properly have been issued unless it was "dictated by pre-existing precedent," such that the Second Circuit is not "free to rule differently in similar cases." Second Circuit Order (June 26, 2007) (adopting Local Rule 32.1), *available at* http://web.archive.org/web/20070722080857/www.ca2.uscourts.gov/Docs/Rules/Rule32.1.pdf (last visited June 8, 2009).[3] Regardless whether the law as it now stands in the Second Circuit was established in this case or a prior one, that law is both clear and in conflict with that of the Federal Circuit, and this Court should resolve the conflict.

II. THE ISSUE PRESENTED IS IMPORTANT AND TIMELY

The petition shows that the availability of neutral arbitral forums, particularly for investors having commercial dealings with government entities, is an

[3] The only other possibility is that the Second Circuit's affirmance is based *neither* upon Second Circuit law established in this case *nor* upon pre-existing precedent. The petition points out, and respondents nowhere dispute, that the courts below not only failed to address *Hardie* but also failed to identify binding precedent that might dictate a contrary outcome here. Pet. 19-20. A decision that admittedly lacks legal basis plainly would necessitate some form of corrective action by this Court. Pet. 21.

important issue. Pet. 21-23. This is underscored by the fact that many foreign courts, like those in Ecuador, are subject to political pressures and do not adhere to the rule of law. Pet. 22. The petition also shows that the specific issue presented here—concerning a government entity's obligations when it steps into the shoes of a private party in a commercial joint venture—is especially significant and timely given the stakes being assumed by governments around the world in private businesses affected by the ongoing economic crisis. Pet. 24.

Respondents neither dispute these points nor deny the general importance of the issue presented. The additional factors they cite in an attempt to lessen the importance of this case are unavailing.

Respondents note that there might be alternative venues for petitioners to seek indemnification from respondents for the proposed $27 *billion* Ecuadorian judgment against Chevron. Opp. 26-27. Relatedly, respondents emphasize that the permanent injunction of arbitration is interlocutory, in that petitioners have counterclaims for indemnification pending in the district court based on an environmental settlement agreement with respondents. Opp. 30-31. But these points are irrelevant. The right to pursue relief *in international commercial arbitration*, which is what petitioners seek here, has independent importance.

Respondents also assert that there is no "recurring fact pattern" because few cases will involve a "large multinational oil company ... engag[ing] a foreign sovereign in a contractual business relationship covering more than 17 years" without a signed contract. Opp. 27. As discussed, however, the issue

presented here is not limited to foreign governments, and *Hardie* and this case illustrate how the same issue can be presented with closely analogous facts but in very different contexts. *See also Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003). Moreover, in suggesting that this issue should never arise because corporations with "sophisticated ... counsel" should *always* demand a signed agreement with a foreign government entity (Opp. 27), respondents are assuming that such corporations can *never* claim the benefit of either assumption or estoppel—which is precisely the question presented in this case.

CONCLUSION

For these reasons and those set forth in the petition, this petition should be granted.

Respectfully submitted,

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